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Message From Patron–in-Chief

In keeping with the avowed objective of National Law School of India University (NLSIU), which is to provide "intellectually stimulating, professionally competent and socially relevant legal education", NLSIU, Bangalore has taken up the responsibility of studying `Law & Public Policy' in juxtaposition.

It delights me to note that the first volume of the Journal of `Law & Public Policy' is being released under the aegis of the School of Distance Education.

The primary objective of Public Policy is to bridge the gap between the rhetoric and reality.

The issues that are required to be deliberated are:

(i) is public policy run on a myth?

(ii) is wishful thinking sound public policy?

Chomsky has said: "there is a tremendous gap between public opinion and public policy". How to bridge this gap is another important issue? While remembering that policies are ephemeral and principles are eternal, the sacred objective of any discourse on public policy should be to provide durable solutions which would help to make social audit and public audit more meaningful thereby contributing to innovations and not renovations in the governance.

I am sure this journal of `Law and Public Policy' will eminently live to the expectations of all the stakeholders.

Congratulating Dr. Sairam Bhat, the Chief Editor and his team, I wish the journal all success.

Prof. [Dr.] R. Venkata Rao
Vice-Chancellor

Editorial

It delights me to publish the 'Journal of Law and Public Policy' at the National Law School. The Journal is the outcome of the relentless efforts of Prof. R Venkata Rao, Vice Chancellor, NLSIU. Prof. Rao's constant, unconditional and encouraging support coupled with exemplary leadership, pleasing personality and exceptional administrative skills have been a source of inspiration to us. He has always directed my academic path to evolve avenues for research, publication and achieve higher levels of academic excellence. His encouragement for our work and guidance in each and every step has facilitated us to make constant endeavours to transform our institution as a premier in the field of legal education.

Also, the key to the successful launch of this journal is the contribution of Prof. [Dr.] O V Nandimath, Registrar, NLSIU, who in both, a personal and professional forefront has been providing us with all necessary support and guidance in all our endeavours.

We profusely thank our Patrons for entrusting their faith in our abilities to launch the 'Journal of Law and Public Policy'.

Our maiden-issue opens with an article from Prof. [Dr.] Ishwara Bhat, Vice Chancellor, WBNUJS. His article 'Income Tax exemption to the Third Sector Organizations in India' critically examines the role of third sector organisations in India and the need for State government to encourage their activities through tax exemptions. The paper states that the State and Third Sector Organizations have been playing an imperative role in order to serve the society better. This paper analyses the conceptual understanding of the tax exemption clauses to the Third Sector Organizations thereby exploring the constitutional dimensions with regard to exemption of tax for such organizations. An analysis on the legal concept of charitable purpose and the method of identifying the same in light of legislative and judicial developments have been dealt elaborately. The author through this paper has analyzed various types of tax exemptions

and deductions provided to Third Sector organizations under the Income Tax Act and its abuse by undeserving organizations and control mechanisms have been recommended.

Rajeev Babu in his article highlights the law on acquisition and how the alleged indiscriminate acquisition of land, payment of inadequate compensation and want of rehabilitation resulted in the citizens resorting to violent protests against the Government. The Indian Constitution under Article 300A necessitates only one restriction on the power of eminent domain, that is, "Authority of Law". Intention of the founding fathers of the Indian Constitution was to make Right to Property as a Fundamental Right and the same was made as a Fundamental Right in the original Constitution. The makers of the Constitution knew that land reforms could have been introduced within the framework of the original Constitution by a process of harmonisation of the Fundamental Rights and Directive Principles of State Policy. The above intention and assurance to the people and the past conduct and practice of the Government allowing the masses to enjoy the fundamental right to property have instilled a firm belief that the Government would not deprive the people of the fundamental right to property. In reality, this has generated a legitimate expectation of fundamental right to property and the people of India rightfully expected the Government to honour the legitimate expectation of fundamental right to property.

Miranda Das in her write-up deals with international humanitarian law relating to rape. The author has not only critically analysed the law on rape but has also addressed the study of its evolution as a legal category along with the evolution of international law has also been attempted. Thus, the paper presents multiple definitions of rape which have been codified within the international jurisprudence at different points in time in order that this phenomenon may be properly dealt with in the legal structure.

Tanmoy Majilla and Orlaine Pereira in their submission discuss the issue of Tobin tax. Tobin tax has been debated globally since its introduction and achieved more significance after global financial crisis, which demands a new financial architecture. The tax has been looked at as an instrument to prevent volatility and fluctuations in exchange rate and achieve financial stability in

Capital Markets throughout the world. On the other hand the feasibility of having a worldwide consensus for Tobin Tax remains an open question. This article examines the question of necessity and feasibility of imposing a Tobin Tax.

The article of Savio J F Correia, is a critical assessment about the functioning of the National Green Tribunal. While the National Green Tribunal Act 2010 was enacted to fill the long felt need to establish specialized environmental courts that would overcome the increasing complexity of environmental litigation and procedural rigidity of regular courts, concerns have been expressed over several critical provisions not being happily worded and leaving loopholes or scope for misinterpretation. Limiting the National Green Tribunal's jurisdiction to "substantial questions relating to environment" would leave the given facts canvassed in a petition to the subjective assessment and mindset of an individual to judge. The author argues that litigant would be relegated to dealing with complex procedural technicalities coupled with delay tactics and perennial delays associated with regular civil courts, more so in cases of execution.

Josyula Lakshmi & Tejbir Singh Soni in their write up state that the making of a law in India has had its historical legacies and is a reflection of its past in that it carries the English colonial past of its formulation and execution. Laws are made for society. They reflect the way societies organise themselves by way of harmonising any potential disruptions by adhering to set rules of living. In doing so, history shows that the socio-political elite plays a major part in spelling out what ought to be law and how it can best represent people's aspirations and the society's desire for maintaining normalcy. Most laws have come into being against the above mentioned backdrop and are hence time and again amended, reviewed and reinterpreted to suit the changing times and greater inclination towards human rights rather than pre-conceived societal rights alone. The act of putting law making into the public domain by way of taking inputs on draft legislations, consultation processes envisaged etc. give a new impetus to what law ought to be and how it can be a popular law if it is put to consultation at the making stage. While welcome, the process itself may not be sufficient to guarantee its acceptability. The paper tries to decipher the same.

Next we have an article on the crucial aspect of judicial accountability. Shivika and Sukant discuss the aspect of Judicial Accountability which has been an overwhelming concern currently in India. Amidst reports of misappropriation and impropriety, it is pertinent to ensure accountability so that the public continues to entrust its faith in the Judiciary. Taking cognizance of this requirement, the Judicial Standards and Accountability Bill 2012 had been passed by the Lok Sabha. The Bill lays down standards of judicial conduct and provides for investigation of charges by the Scrutiny Panel and the Oversight Committee. While the Bill awaits approval of the Rajya Sabha, it is desirable to analyse the provisions to understand the extent to which the Bill delivers on its promises without compromising judicial independence. This legislative note examines the impact of the Bill on the concepts of judicial accountability and judicial independence. While doing so, the authors examine the provisions of the Bill related to investigation, the constitution of Scrutiny Panel and Oversight Committee, the definitional issues, and concerns regarding the termination of services of the judge. The attempt is made to ascertain the efficacy of the Bill resolving the existing issues rather than creating more complexities.

Next, Harman Shergill, in his article, highlights the Ethical and Legal Issues in Surrogacy. After the success of various other processes being outsourced from India such as business, legal and knowledge processes, the latest is the outsourcing of wombs. Over the past few years, India has seen an explosion of fertility services that promise a cure for the increasing rates of infertility. The fertility industry is an integral part of the country's expanding 'medical tourism'. Surrogacy, being the practice of gestating a child for another couple or an individual in return for remuneration, has drawn much attention and raised several ethical issues. India has emerged as a hub for surrogacy arrangements due to its conducive environment owing to a variety of reasons including lack of regulation, comparatively lower costs in relation to many developed countries, shorter waiting time, the possibility of close-monitoring of surrogates by commissioning parents, availability of a large number of women willing to be surrogates, and infrastructure and expertise comparable to international standards. On the other hand, there are issues concerning citizenship, surrogates'

payments, contract between the surrogate and the commissioning parents and exploitation. To address such issues and to regulate surrogacy arrangements, the Government of India has taken certain steps including issuance of guidelines but till now, there has been no legal provision dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child and the commissioning parents. The proposed Assisted Reproductive Technology Bill, 2010 is expected to beef up surrogacy guidelines authored by the Indian Council of Medical Research (ICMR) that have often gone unheeded by the few hundred Indian fertility clinics accustomed to writing their own rules. The author seeks to establish that there is an urgent need to initiate processes for a critical understanding of 'surrogacy', that has assumed the proportion of a transnational industry towards building a collective, feminist response to it.

Next article is on Genetically Modified Foods and its impact on our lives. Bhuvanyaa Vijay explores the arguments for and against and the challenges pertaining to GM Foods, why they are inept for consumption, how the arguments for its proponents find no tangible grounds and finally, how can the consumer's right to health be protected by espousing their right to know about the food they consume through labelling of GM Foods. The article suggests that unless authentic studies do not validate safety of GM Foods for consumption, they may not be let loose for commercial distribution in markets. For those products regarded as innocuous and which ultimately do find a way onto our platter, labelling is the primary precautionary step to inform consumers and enable them to make guided choices. Till execution is lacklustre and the regulators are listless and dispirited to enforce laws prohibiting GM Foods, mere existence of regulations/laws will not protect consumer's interests. We cannot be left becoming the lab-rats and guinea-pigs of a technology which is an infant science, far too uncertified and greenhorn to be left unbridled among us.

In the last section we have two case comments. Firstly, Yashomati Ghosh analyses the suo motto petition in the Supreme Court *In Re:* Indian Woman says Gang-Raped on orders of Village Court in which the author critically examines the incident of January 23, 2014, when the entire country was in a state of shock when media reported that a woman in the rural villages of

Bengal had been gang-raped at the orders of the Salishi Court (equivalent to khap panchayats) for having relationship with a man outside her community. The country wide protest and media outcry at this inhuman incident made the Supreme Court take suo-motu action. The orders passed by the Court assumes academic significance on several counts like recognition of the rights of the victims, upholding the vicarious liability of the state, widening the scope of compensation and rehabilitation measures etc., and necessitates the need for critical study. Secondly, we have a case comment submitted by Sanyukta Singh on *'Esha Ekta Apartments Co-operative Housing Society Ltd. and others* v. *Municipal Corporation of Mumbai'*. The protracted dispute between the residents of the Campa Cola Society and Mumbai Municipal Corporation has been covered in several news reports. To most people, the demolition by the municipal authorities of the illegally constructed apartments in the Campa Cola Compound has seemed patently unjust, after the same have been home to the residents for decades. However, this entire matter was scrutinized and analysed in detail by the Supreme Court of India, which ultimately held that the demolition orders were legally sustainable. Unauthorised construction is widespread in our cities and possibly home to millions. Did the Supreme Court enforce the letter of the law at the cost of interest of the public or to safeguard it? The author vide this case comment has sought to present the key facts of this case, the reasoning of the Supreme Court as well as analyse the key aspects that would be fundamental for resolving this issue.

'ISRO is not just Rockets' is a review of the Book titled - 'Touching Lives – The little known triumphs of the Indian Space Programme', S. K. Das New Delhi: Penguin Books India (2007) written by Kumar Abhijeet. The book classified into thirteen chapters is a reckon ranging from the mountains of Himalayas to the God's own country – Kerala, embracing the glittering Ganges in the East to the incredibly beautiful Lakshadweep Islands, revealing how human life have become keen by just one touch of ISRO. Most of the ISRO projects are ongoing in the remote areas where facilities are not so freely available as compared to cities. It has taken real life examples from various parts of the country sharing experiences of people where ISRO has significantly made

contribution in addressing their social problems. "ISRO has capabilities that are comparable to the best anywhere in the world, but what makes it different is the way in which ISRO's satellites deliver services to the society, by shrinking both time and space." The book introduces the other side of the Indian space programme and reveals it's little know triumphs in overcoming the miseries of the common man. Touching Lives is a manifestation of competence of space based technology to address the social problems in India.

This journal is a step, in furtherance of the NLSIU mandate of providing intellectually stimulating, professionally competent and socially relevant legal education. This journal is an outcome of the team efforts of the editorial board. I wish to express my sincere appreciation to all members of the editorial team and to my Distance Education Department staff led by Ms. Susheela.

Dr. Sairam Bhat

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BOOK REVIEW

Income Tax Exemption to the Third Sector Organizations in India: An Analysis of the State-Society Synergetic Relation from the Perspective of Re-democratization*

*Prof. P. Ishwara Bhat***

Introduction

It is a positive and exciting factor that the State and the Third Sector Organizations (TSOs)[1] generally interact with each other for mutually reinforcing their competence to serve the society better.[2] The vast presence, reach, spheres of influence, and multiplicity of activities of TSOs in India[3] have called for regulatory regime that addresses this objective. One part of such

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* Paper presented in the 8th ISTR Asia Pacific Regional Conference held in Seoul, Korea in October, 2013.

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1 These consist of voluntary organizations and foundations, working for the benefit of people by filling the gap between State and the commercial sector, acting without profit motive by channelizing the wealth and social energy of people towards the common advantage, and by upholding human values. Registered societies, cooperatives, non-profit companies, trade unions, trusts, endowments, waqfs, foundations and associations are the main forms of TSOs.

2 The protective, facilitative and regulative function of the law has established the ambience for TSO functioning whereas the TSOs supplement the State activities by establishing educational institutions, running charitable hospitals, expanding access to food, supporting calamity-affected persons, and by helping execution of the State-sponsored schemes like Sarva Shiksha Abhiyan, IRDP, Janani Suraksha Yojna etc. Sections 35 AC and 80GGA of the Income Tax Act, 1961 specifically provide scope for their functioning and getting tax benefits.

3 According to an estimate made in 2002, there are 12 lakhs registered and unregistered VOs having in total annual turnover of Rs.20,000 crores with 27 lakhs paid employees. The number of registered cooperative societies in 2010 figured 6 lakhs. In view of vigorous growth of self-help micro finance groups and cooperative societies in various states and proliferation of NGOs and religion-based organizations, the number of NPVOs today can be guessed as exceeding 25 lakhs. The cooperatives have membership coverage of 249 million, both vertically and horizontally knit, accessing 97% villages, and embarking on many economic activities including dairy, fisheries, agricultural marketing, rural finance, agro-based industries and agriculture. According to Rajinder Sachar Committee report there are 4.9 lakh registered waqfs in India. The number of registered and unregistered endowments and religious organizations is also considerably big.

regulatory measure is providing support of tax exemption to those TSOs, which genuinely and fairly serve the society. While the tax exemption law reduces the potential revenue collection, it augments the financial competence of TSOs to serve people more effectively. Hence, the political policy making that underlies the annual Finance Act and its amendments has its distinct impact upon this law. In a democracy, it is highly desirable that such important policy choices emerge as products of public opinion.[4] In view of the fact that the spiraling relation between State and society in a democratic set up revitalizes the working of democracy, this paper attempts to analyze the synergy of such relation in the context of tax exemption law.

Conceptual Analysis

The notions that there shall be 'no taxation without representation', and that 'the government shall be in accordance with the consent of the governed' are the two fundamental principles of democracy.[5] True to the constitutional spirit and aspiration, they find their practical application in the legislative process in the matter of laws governing Third Sector Organizations (TSOs). In India, the prolonged debates on the issues of reforming the Cooperative Societies law, Foreign Contribution Regulation Act, Waqf law and law of charitable institutions, both inside and outside the legislature, have convincingly proved vibrancy of democratic process.[6] Regarding evolution of legal policy on tax

4 According to de Tocqueville, democracy often means not form of government, but a special condition of society or state of things under which there exists a general equality of rights, and a similarity of conditions, of thoughts, of sentiments and ideas. Equal opportunity to participate in the decision making process constitutes the prominent feature of democracy. Alex de Tocqueville, Democracy in America, Tr. H Keene Vol. I, (New York: The Colonial Press, 1900), A V Dicey viewed that 'public opinion' is the belief or conviction prevalent in a given society that particular laws are beneficial, and therefore ought to be maintained, or that they are harmful, and therefore ought to be modified or repealed. Public opinion both precedes and follows law in a democracy. See A V Dicey, Law and Public Opinion in England, 2nd ed., (New Delhi: Universal Law Publishing Co, 1914, rept. 2003) pp. 3, 41-3, 50.

5 These are well established in the Bill of Rights 1689, the event in American history (Boston tea party to be specific), Indian freedom movement (salt satyagraha to be specific) and find place in Article 285 of the Constitution of India. According to Article 265 of the Constitution, "No tax shall be levied or collected except by authority of law."

6 The developments since 2000 depict this scenario and illustrate. Debates on FCRA Bill 2005, Cooperative Societies Bill and Waqf Bill 2010 have been quite engaging and extensive.

exemption to TSOs also, there has been equally dynamic law-society interaction. In view of the fact that laws touching upon intimate acts of communitarian living get such continued response from the bosom of the society, this interaction is special and noteworthy. This is, by and large, part of the general practice relating to the law making activity as a whole, and this adds to the robust functioning of democracy.

In fact, various institutions and values of democracy grow strong with such interactions, and get reinforced along with restoration of principles of accountability in cases of deviation. Plough back and mulching of democratic experiences nourish the roots of democracy to further deepen for firm and fruitful actions. For the reason that state is the largest association known to law and that it is an association of associations, the horizontal relation between the state and other association calls for mutual assistance and balancing amidst them.[7] Democratic process at any stage is not a fait accompli, but it is an ongoing vigilant feature of responsive and responsible political system. The threats and actualities of authoritarianism, arbitrariness, corruption, poverty, sluggish development, and injustice challenge the society to re-democratize it and rebuild its strength to deal with such problems. The post-colonial developments in South Asian countries have responded to these problems.[8]

The triangular relation between the TSOs, State, and Society in formulation of tax exemption policy provides space for lobbying, bargaining, negotiating and balancing. This process is vital in democracy because each entity has distinct stake in, and impact of, either having or not having particular tax exemption policy keeping in view the cost and benefit accruing from the same. State looks to augmenting of the tax collection, as it is essential for maintaining civilization. As O W Holmes had put it, "Taxes are what we pay for a civilized society."[9] It

7 W. Friedmann, Legal Theory, Fifth ed., New Delhi: Universal Law Publishing Co.2002, pp. 236-7; Julius Stone, The Province and Function of Law, Indian Rept. (New Delhi: Universal Publishing Co. 2000), p.307.

8 Emergency in India in 1975, military regime in Pakistan and Bangladesh in the past, terrorism.

9 Cited by Karla Simon, 'Rule for Not-for- Profit Organizations: A Survey of Practice' paper presented in the Conference on Taxes, Civil Society and Law in Wien, 2004.

is a fundamental principle of taxation that tax shall be imposed solely for the purpose of raising revenue and should be imposed with absolute equality or as near equality as possible, upon the rich and the poor alike. But in a welfare state the policy of exempting the poor from the burden of some taxes like Income Tax, and subjecting the rich to more tax emerged.[10]

Taking the Holmes notion further, it is possible to reason that since civil society is a prerequisite for civilized society, support of tax benefit that enables the TSOs function better is part of the tax obligation. Hence, TSOs persuade for carving a reasonable niche for them to protect from the tax net and make their activities effective. Society aspires for a sustainable and fair atmosphere for charity body's competence and facility for supporting public welfare activities and for promotion of human rights. As Fukuyama observed, "Civil society serves to balance the power of the State and to protect the individuals from the state's power."[11] Thus, tax exemption policy is product of several interacting forces and considerations that support human rights and public welfare activities. The functioning of republicanism in this context has cascading effect to flourish democratic values of the society.

Theoretical justifications for tax exemption of TSOs include the following arguments: that it partially relieves the government's burden of doing public good and subsidizes the robust and pluralistic acts that promote public welfare[12]; that TSOs are mere conduits through which the funds move from the donors to the ultimate recipients although they have discretion in administering the disbursal of benefit[13]; that tax exemption serves to compensate for

10 W. Friedmann, Law in a Changing Society, Abridged ed., (Delhi: University Book House, 1959 Indian 3rd rept.1996) p. 85.

11 Francis Fukuyama, 'Social Capital and Civil Society' a paper presented in IMF in 1999, accessible in http://www.imf.org/external/pubs/ft/seminar/1999/reforms/fukuyama.htm cited in Karla Simon, 'Tax Rule for Not-for- Profit Organizations: A Survey link of Practice, Supra n. 9.

12 James J. Fishman and Stephen Schwarz, Non profit Organizations: Cases and Materials, 4th ed., (New York: Foundation Press, 2010)p;298; Trinidad v. Sagrada Ordende Predicadores 263 US 578 44 Sct.204 (1924).

13 Boris I Bittker and George K. Radhurt, 'The Exemption of Nonprofit Organisations from Federal Income Taxation' 85 Yale L.J. 299,307 -316 (1976); also see James Fishman Supra n. 12, 302 -7.

difficulties that non profits experience in raising capital[14]; and that it enables social experiments, widens knowledge, and protects human rights.[15] These constitute grounds for distinguishing TSOs from commercial sector, provide justification for reasonable classification, and satisfy the requirement of equality. The functions of tax exemption law include support, equity, regulation and supervision or border patrol.[16] Since charity assists religion and freedom of discussion; enlarges access to education, health, food and other basic necessities of life; and helps in lessening the pains of poverty, people's aspirations to support charity have added to the process of rediscovering the potentialities of democracy in the post-colonial period to actualize the goals of people's welfare. Charity's contribution in effectuating social, economic and cultural rights has been well-established over the centuries in various parts of the globe. Article 13 of the General Assembly's Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1999 (UN Declaration on Human Rights Defenders), states, "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms, through peaceful means, in accordance with Article 3 of this Declaration." Article 3 obligates the States to ensure that domestic law is consistent with the task of implementing human rights instruments. In addition, tax exemption for TSOs effectuates the constitutional policy of economic justice through equitable distribution and non-concentration of wealth.

14 Henry Hansmann, 'The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation' 91 Yale L.J 54, 72 -75 (1981).

15 Chauncey Belknap, 'The Federal Income Tax Exemption of Charitable Organization: Its History and Underlying Policy' extracted in James Fishman et al, Supra n.12 p.299. Since governmental function is also for bringing people's welfare (Article 38 of the Constitution), NPVOs can be considered as supplementing the governmental function and are acting as partners in advancement of welfare activities. Because of their social presence, local knowledge and active help, genuine NPVOs assist in meeting social and economic goals to which the government is committed to.

16 John Simon, Harvey Dale and Laura Chisholm, 'The Federal Tax Treatment of Nonprofit Organizations,' in Walter W. Powell and Richard Steinberg (ed), The Nonprofit Sector: A Research Handbook 2nd ed. 2006 p. 267; also see James Fishman et al, Supra n. 12 p. 296.

As reflected in the budget and Finance Act related discussions, public opinion has vibrantly influenced the legal system to provide tax exemption to the Third Sector Organizations (TSOs) in relation to their income, property, and activities. The Dicean notion that law creates or fosters law creating opinion[17] is vindicated in the context of various amendments through which this branch of law got developed. The Constitution and international norms on human right defense recognize that support to charity stands on a relation of mutual assistance with human right. Such support flows significantly from income tax exemption. Non-discrimination on ground of religion, caste and ethnicity in the matter of tax exemption or tax liability is a principle that helps to build a multicultural and harmonious society. Support to cultural rights, education and expressional freedom invigorates the knowledge system. Assembly and association enable effective social participation. Various movements for protection of women, children, disabled, marginalized classes, consumers, and environment have been adding to the worth of human right protection. Charity's support to access to basic necessities of life like food, shelter, health and education and livelihood make right to dignified life meaningful. Thus, the tasks of promoting welfare, rendering justice and protection of human rights undertaken by TSOs make democratic system work for achieving the ideals of the Constitution. Democracy is a continuous phenomenon to which each generation has a responsibility to contribute and keep the democratic system alive. The TSO functioning has a great role in this matter.

Constitutional Dimensions

Secularism being one of the basic features of the Constitution has influenced the limitation on tax exemption law for religious charities. Even the colonial policy was to keep tax exemption to religious charity within limit. Article 27 of the Constitution states, "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination." The Supreme Court in *Prafull Goradia* (Hajj Subsidy case) observed, "Article

17 A V Dicey Supra n. 4 p. 41.

27 would be violated if a substantial part of the entire income tax collected in India, or a substantial part of the entire central excise or the customs duties or sales tax, or a substantial part of any other tax collected in India, were to be utilized for promotion or maintenance of any particular religion or religious denomination. In other words, suppose 25 per cent of the entire income tax collected in India was utilized for promoting or maintaining any particular religion or religious denomination, that, in our opinion, would be violative of Article 27 of the Constitution."[18]

When examined in light of the above observation, the tax exemption for religious charity does not violate Article 27 because the exempted tax is a very small quantum compared to the quantum of tax collection and because of the fact that the exempted tax is uncollected tax, and does not constitute the component of public revenue. However, stretching the second reason to accommodate any type of religious charity and without limitation will be impinging public revenue. Since recognition of public religious purpose is evident from temple entry law, social reform measures and State's competence to ensure public order, morality and health State expenses supporting fringe areas of religious activities are regarded as justified.[19] True to this broad approach, income tax law excludes from tax exemption income from the property held under a trust for private religious purposes which does not enure for the benefit of the public.[20] It also avoids support to charities which make distinction on the basis of religion, caste and community.

Another question may also arise: whether tax exemption law would pass the test of reasonable classification. The possible argument might be that public revenue is a valuable resource supporting public expenses for various public

18 Prafull Goradia v. Union of India AIR 2011 SC (Supp) 601 per Markandeya Katju J.

19 Text of Articles 25 and 26 provide for this position. Even the concession of fringe benefits is with limitation. In Union of India v. Rafique sheikh Bhikan AIR 2012 SC 2453 the Supreme Court directed the Central Government to progressively reduce the amount of subsidy so as to completely eliminate it within a period of 10 years from the date of judgment. "The subsidy money may be more profitably used for upliftment of the community in education and other indices of social development."Per Aftab Alam J.

20 Section 13 of the Income tax Act, 1961. See infra for discussion.

purposes including people's welfare and that unburdening the NPVOs from tax would deprive an opportunity for them to financially participate in public action through tax contribution and would throw the burden only upon the regular tax payers. When both the NPVOs and commercial enterprises or other income generators stand on equal footing in the matter of production of income, what makes the NPVOs to fall under a different category insofar as tax liability is concerned. Apropos, it can be said that the theoretical justifications discussed in earlier section provide for rational criteria for differentiation. Since charity itself is for welfare, the point raised in the hypothetical argument is properly addressed. The only requirement is that NPVO shall promote public welfare. When by spending money for charitable purpose, they are deprived of the resource, subjecting them to pay tax is double burden Further, the general approach of the judiciary not to intervene in tax policy matters in the context of equality based arguments and presumption in favour of constitutionality of statutes save the tax exemption law's constitutionality.[21] The constitutional requirement that taxation shall presuppose valid law provides scope for interaction between law and public opinion.[22]

A Peep into the History

Historically, religious and charitable services were considered as for general welfare and were regarded as equivalent to payment of tax.[23] The tradition of royal grants and gifts to temples and their activities had corollary in not taxing them as a source of revenue but reflected respect to divinity and community effort and recognition of public interest.[24] The basic principle of secularism that state should not emasculate property interests of dissenting religious

21 Khyerbari Tea Co. v. State of Assam, (1964) 1 SCR 975; G K Krishnan v. State of Tamil Nadu (1975) 2 SCR 715; ITO v. N T Roy Rymbai, (1976) 3 SCR 413.

22 Article 265.

23 Manu Smriti VII 133: "The king shall not collect taxes from a Shrotriya or a Brahmana who is well versed in Vedas and bears good character" Vishnu Dharmasutra (Sacred Books of the East Vol Vii) 16-26-27:" Let him (King) shall not collect taxes from Brahmanas.

24 Kautilya's Arthasastra 2, 15 provided for tax exemption on the income derived from land granted by the King. Also see, Romila Thapar, Cultural Pasts (New Delhi : Oxford University Press, 2010) P. 83-84.

faiths essential for their religion made the rulers to return to them the land or the property acquired from them through force.[25] Community patronage for construction of places of worship was not disturbed by power of taxation. The colonial income tax law deviated from the English model (i) by not expressly recognizing advancement of religion as charity, and thus confining the tax exemption only to public religious trusts; and (ii) by using the words 'general public utility' instead of 'purposes beneficial to the community' and thus of providing wider scope for tax exemption benefit to acts of public utility.[26] The social reason for this consisted in avoidance of partisan and religion based preferences in a multi religious society. Further, politically influenced colonial policy avoided tax exemption to expressional and associational activities supporting the freedom movement. Both in Tribune and Lokmanya Tilak Fund cases tax courts declined to give exemptions to income from the property of trust which had political purposes.[27] The social impact of tax policy was not favourable to human right issues.

Charitable Purpose: Development Towards the Present Scenario

Indian Income Tax law started with an enactment in 1860 and developed through an improved version in 1866. In 1918, the Income Tax Act was introduced on the basis of recommendations of the All India Income Tax Committee. In 1922, the Income Tax Act, 1922 was enacted, which remained in force until the passing of the present Income Tax Act, 1961.[28] The last part of Section 4(3) of the Act of 1922 defined the term 'charitable purpose' as inclusive of relief of the poor, education, medical relief and the advancement

25 R. Champakalakshmi, "From Devotion and Dissent to Dominance" in David N Lorenzen, Religious Movements in South Asia 600-1800 (New Delhi : Oxford University Press, 2004,2011) pp. 69-70.

26 On legislative history see S Rajaratnam (ed) Sampath Iyerngar's Law of Income Tax 10th ed Vol I (New Delhi : Bharat Publisher,2005) pp 1-5.

27 Re, The Tribune's Trustees (1939) 7 ITR 415; In re Lokmanya Tilak Jubilee National Trust fund, Bombay, In re G V Salvekar, AIR 1942 Bom 61.

28 On legislative history see S Rajaratnam (ed) Sampath Iyerngar's Law of Income Tax, 10th ed Vol I (New Delhi : Bharat Publisher, 2005) pp 1-5.

of any other object of general public utility. Although largely based on the English concept of charity, it deviated from the Statute of Elizabeth (i) by not expressly recognizing advancement of religion as charity, and thus giving scope for confining the tax exemption benefit only to public religious trusts [29]; (ii) by using the words 'general public utility' instead of 'purposes beneficial to the community' and thus of providing wider scope for tax exemption benefit to acts of public utility [30]. The Lahore High Court[31] and the Privy Council [32] recognized the deviation from English law and considered the English decisions as unhelpful in interpreting the Indian definition. The distinction is crucial, and is followed in both pre-independence and post-independence period. The social reasons for accommodation of cultural diversity in the colonial system consisted in avoidance of partisan and religion based preferences in a multi religious society and aspiration to tap wide potentially of charity for objects of general utility, a policy which resisted thoughtless transplantation of colonial master's law.

Independence dawned new era for self determination in tax matters. Tax policy became sympathetic to human right and welfare issues after 1961. Benefit to private religious charity and caste/community based preferences were kept outside the tax exemption. Similarly, law excluded gifts bringing personal aggrandizement to the donor or benefiting his family. Law also

29 Last part of Section 4(3) of the Income Tax Act, 1922 made the tax emption clause not applicable if the trust property is held for private religious purposes which does not ensure for the comfort of the public. Section 13 of the present IT Act, 1961 reflects similar policy.

30 For the analysis that charitable purpose under Indian Law goes much farther than definition of charity in English because of this deviation see Sampath Iyenger, Supra n. 26 pp. 439, 441. Also see Kanga, N A Palkhivala and Vyas, *The Law and practice of Income Tax,* 9th ed., (Dinesh Vyas) vol I (New Delhi: Lexis Nexis Butterworths 2004) p. 521-522 All India spinners Association v CIT (1944) 12 ITR 482 (PC); CIT v Surat Art Skill Cloth Mfg. Association 121 ITR, 11-16. to illustrate the difference, in English law trust for the preservation of all animals or birds or non-human creatures is void because it does not bring benefit to the human community (Re Grove-Grandy, (1929) 1 ch 557) whereas in the Indian law trust for preserving of animals, without the further question whether it promotes feeling of kindness, is for general public utility (Vallbhdas Natha v. CIT, 15 ITR 32).

31 Trustees of the Tribune, In re (1935) 3 ITR 246, 272 (Lah).

32 Trustees of the Tribune, in Re (1939) 7 ITR 415, 420 (PC).

required registration of charitable trusts or organizations as a safeguard measure against abuse. The definition as stood originally in 1961 had stated, ""charitable purpose" includes relief of the poor, education medical relief, and the advancement of any other objects of general public utility not involving the carrying on of any activity for profit." The condition 'not involving the carrying on of any activity for profit' qualifying the words 'objects of general public utility' was subsequently deleted in 1984, thus giving scope for mixing profit oriented acts with charity so that business may robustly support charity.

In 2008, first proviso was added: "Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any services in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention of the income from such activity." The Finance Minister justified the change by stating that the claim by some business entities that their activities were also falling under 'charitable purpose' was not within the intention of Parliament, and that the proposed change would ensure that "Genuine charitable organizations will not in any way be affected."[33] Further, charitable organizations supporting business activities, for example, Chamber of Commerce and similar organizations which render their services to members would not be affected by the amendment, and their activities would be regarded as any other objects of general public utility.

In 2009, there was inclusion of "preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest" in the main clause as a type of charitable purpose. Apropos, it can be stated that the growing importance of the policy of environmental protection and social acceptance of its paramount position in public action have made a deep impression upon tax exemption policy. The interest shown by charitable trusts in protection of environment and

33 Cited in S. Rajaratnam, M. Natarajan and CP Thangaraj, Law and Procedure on Charitable Trusts and Religious Institutions 10th ed (Mumbai: Snow White Publications, 2010) p.424.

heritage buildings has also been reciprocated by law.[34] The phenomenon of re-democratization has worked for the benefit of ecology.

In the judicial treatment, the shift of focus to motive/object/purpose of application is the achievement of the first proviso. This departure towards objective criteria is for good because what ultimately benefits to the society is application of the fund for charitable purpose. Now it is the burden of the claimant to establish that the consideration or income of the economic transaction (trade, commerce, or business) is used or applied for general public utility. While expansion of tax exemption to charity place due to the democratic process, democracy's inclination to gather support to charity-sponsored welfare activity from the business world became explicit. Both in 1984 and 2009 or even in 2011, the democratic process had initiated and effectuated the change.

The scope of 'general public utility' as a ground of tax exemption for charity has been shaped by legislative changes and judicial interpretations. Accurate definition of these words is very difficult. But they stand in contrast to, and exclude the object of private gain such as an undertaking for commercial profit, though the undertaking may sub serve general public utility[35] In order to know exclusion of private gain, in addition to the object of the trust, the purpose for which the income is applied shall also be considered.[36]

The insertion of modifier (1961) "not involving the carrying on of any activity for profit" had the effect of severing the charitable purpose from profit making undertaking[37]. Two interpretations for this clause were possible: (a)

34 For example, Infosys Foundation has a permanent scheme of protecting the heritage buildings.

35 All India Spinners Association v. CIT 12 ITR 482, 488(PC).

36 Sivakasi v. CIT 217 ITR 118.

37 According to Sen J this had radically altered the law and deliberately intended to cut down the wide ambit of the fourth head as engagement in activity for profit by religious or charitable trusts provided scope for manipulation for tax avoidance. CIT v. Bar Council of Maharashtra (1981) 130 ITR 29 (SC).

totally excluding the profit making undertaking from this privilege[38]; and (b) looking to the issue whether the real object is making of profit or whether it is primarily serving the charitable purpose, and after making a purpose scrutiny arriving at appropriate conclusion. In *Lok Shikshana Trust*[39] Beg J. favoured the second approach. The implication was that if the profits must necessarily feed a charitable purpose, under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust. The larger bench of the Supreme Court in *CIT* v. *Surat Art Silk Cloth Mfrs Association*[40] approved the view of Beg J. According to the Court, 'activity for profit' connoted that the predominant object of the activity must be the making of profit. Following `*Surat Art Silk*, P.N. Bhagwati J. in *IENS* observed, "where an activity is not pervaded by profit motive but is carried on primarily for ensuring the charitable purpose, it would not be correct to describe it, as activity for profit merely because profit accrues."[41] This necessitates scrutiny of genuineness of purpose. Profit by itself is not an anathema, but private gain from profit is detrimental to the character of charity. By going for purpose scrutiny, the Court considered that the Federation of Chamber of Commerce

38 In Sole Trustee, Lok Shikshana Trust v. CIT (1975) 101 ITR 234 (Sc) H.R. Khanna and Gupta JJ. for the majority adopted this approach and viewed that ordinarily profit motive is a normal incident of business activity and if the activity of a trust consist of the carrying on of a business and there are no restriction on its making profit, the court would be well justified in assuming that the object of the trust involved the carrying on of an activity for profit. V R. Krishna Iyer J in Indian Chamber of Commerce v. CIT (12975) 101 ITR 796 SC, AIR 1976 SC 10 held that in view of express statutory interdiction upon profit making activity, an institution which carries out charitable purposes out of income derived from property held under trust wholly for charitable purposes may still forfeit the claim to exemption in respect of such income. "If you want immunity from taxation, your means of fulfilling charitable purposes must be unsullied by profit-making ventures. The advancement of the object of general public utility must not involve the carrying on of any activity for profit. If it does you forfeit." But this position stands overruled after Surat Art Silk Manufacturing co case (1980) 121 ITR 1 (SC).

39 Sole Trustee, Lok Shikshana Trust v. CIT (1975) 101 ITR 234 (SC).

40 (1980) 121 ITR 1 (SC).

41 CIT v. IENS136 ITR 81, 87-88; Pathak J. observed, "I am unable to accept the proposition that if the purpose is truly charitable, the attainment of the purpose must rigorously exclude any activity for profit". Also see CIT v. AP Riding Club 168 ITR 393; CIT v. MP Anaj Mahasangh 171 ITR 677. In contrast, where profit making is the predominant object, in spite of its aim to advance an object of general public utility, it would cease to be a charitable purpose under Sec 2(15).

which mainly aimed to protect and promote trade, commerce and industry without making private gain was for charitable purpose.[42] Where trustees were empowered to undertake profit making activity like distribution of event only for achieving the charitable objects of the trust, their acts did not detract from charitable objects of the trust, as per Rajasthan High Court[43] . Similarly, letting out shops and utilization of the rent so earned for maintaining *dharmashala* was tax exempt activity.[44] This approach has been applied by various High Courts when the halls or spaces are rented out the proceeds of which are used for charity.[45]

In 1983, the modifier 'not involving the carrying on of any activity for profit' was deleted. The focus on public utility and avoidance of private gain became clearer. Inquiry into application or use of profit for charity became a sound proposition. But in reality, as Kanga and Palkhivala viewed, the ghost of deleted words still haunted the business profits which were used for generally public utility.[46] Scrutiny of the genuine purpose was the method of filtering.[47] Apropos it can be said that such scrutiny is really to find out the existence or general public utility and use of income for that purpose, and not something related to that involved in the deleted words.

A liberalization driven attempt was made in 2008, by inserting new proviso, to keep the ghost out and perhaps to allow liberal flow of profit of business to first three heads of charity. After 2009, the newly inserted head of charity viz., preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest also gets similar benefit. As a result, if the purpose of the trust or institution

42 CIT v. Federation of Indian Chamber of Commerce & Industry 130 ITR 186.

43 Umaid Charitable Trust v. CIT 125 ITR 55.

44 CIT v. Ganesh Ram Laxminarayan Goel 147 ITR 468; Raghunath v. CIT 158 ITR 432.

45 CIT v. Sangit Kala Mandir Trust , 166 ITR 217 CIT v. Madras Stock Exchange Ltd 105 ITR 546 CIT v. South Indian Film Chamber of Commerce 129 ITR 22.

46 Kanga, Palkhivala and Vyas, The Law and practice of Income Tax, 9th ed., (Dinesh Vyas) vol I (New Delhi : Lexis Nexis Butterworths 2004) p. 537.

47 For example, the Supreme Court in Hyderabad Race Club v. CWT 223 ITR 703 held that conducting horse race and breeding horse for that purpose are not charitable acts.

is relief of the poor, education, medical relief, or ecology, it will constitute charitable purpose even if it incidentally involves carrying of commercial activity. According to the Government Circular, if trade associations involve in trade under the principle of mutuality to contribute to a common fund for financing of some public utilitarian object or venture without participation of third parties, the surplus returned is not chargeable to tax. When the trade or industrial associations (for example Chamber of Commerce)claim to be both charitable institutions and mutual organizations, and activities are restricted to contributions from and participation of members only, they will not fall under proviso to section 2 (15) owing to principle of mutuality. Dealing with outsiders for profit would disentitle them from tax exemption. The idea behind the proviso is that no assessee can make use of 'general public utility' as a mask or device to hide the true purpose which is trade, commerce or business. Each case will be decided on the basis of its facts, and any generalization is impossible. Thus, the development is towards objective criteria of charitable purpose to be proved by the assessee on the basis of facts. This is for good because what ultimately benefits to the society is general utility promoting charitable purpose.

This development also did not satisfy the market economy. The ghost of uncertainty about tax exemption attached to 'advancement of any other object of general utility' by referring to use/application for genuine purpose was to be removed at least to some extent. Second proviso was added in 2010 to llow tax emption for receipts upto the aggregate value of Rs. 10 lakhs, which was enhanced to Rs. 25 Lakhs in 2011. Thus, without further enquiry, the authorities would be allowing tax exemption up to Rs. 25 lakhs. Increasing recognition of profit sector's link with charity is explicit in the development. Since the new proviso also refers to activities mentioned in first proviso, purpose scrutiny is not kept away, but is central to the analysis.

The factor of general public utility in the context of charity denotes altruism and benefit to the public[48]. A provision in the trust deed to prefer poor relatives

48 Sole Trustee Lok Shikshana Trust v. CIT (1975) 101 ITR 234 (SC).

of the settler[49] or that provides for distribution of profits or assets at the time of dissolution of the association[50] do not qualify for tax exemption. Similarly trust to benefit a group of individuals not linked by public or impersonal factor is not charitable.[51] Law does not hold that charity shall begin from home. In home, there is a legal duty towards one's own kith and kin. Charity is a voluntary and other regarding act, and not an instrument of family aggrandizement or duty-bound act. But when charity's focus is on unidentifiable members of a public or a section or class of public, it is also a situation of benefit to the public. Hence, utility to cross section of the society like Khoja community[52], Saraswath community[53] , Agarwal community[54], certain classes of Hindu community[55] or Scheduled Tribe [56] is also coming under the proviso of section 2(15). An object beneficial to a section of the public is an object of general utility and it is not necessary that it should benefit the whole mankind or country or state.[57] By looking to the issue, to whom the benefit goes, the courts engage in purpose scrutiny.

Sometimes, the objects mentioned in the trust deed may include both charitable and profit making purposes whereas in the actual functioning of the trust, the profit making purposes might be defunct or only incidental. In such circumstance courts have looked into the overwhelming functions or purposes in deciding about tax exemptions. This is clear in cases relating to *kuries* or

49 CIT v. Jamal Mohamad, ITR 375; Gordhandas Govindram Family Charity Trust v. CIT.

50 Truck Operator's Union v. CIT (1981) 132 ITR 62 (Del).

51 Arur v. CIT (1945) 13 ITR 465 (Bom); Gordhandas Govindram Family Charity Trust v. CIT (1973) 88 ITR 47 (SC).

52 Bai Hirbai Rakim Aloo Paroo and Kesarbhai Dharmsey Kakoo Charitable & Religions Trust v. CIT (1968) 68 ITR 821 (Bom).

53 CIT v. Saraswath Poor Students Fund, (1984) ITR 142 Kar.

54 CIT v. Paramhams Ashram Trust (1993) 203 ITR 711 (Raj.).

55 CIT v. Trustee Seth Meghji Mathurdas Charity Trust (1959) 37 ITR 419 (Bom.).

56 Girijan Cooperative Corporation Ltd v. CIT (1989) 178, 359, AP.

57 Ahmadabad Rana Caste Association v. CIT (1971) 82 ITR 704 (SC) overruling Kediya Jatiya Sahayak Sabha Fund v. CIT (1963) 49 ITR 74 (Cal) Surjidevi Kunjilal Jaipuria Charitable Trust v. CIT (1978) 112 ITR 368 All; followed in CIT v. Anand Swarup Brijendra Swarup Charitable Trust (1990) 187 ITR 656 All; CIT v Pt. Ram Shankar Misra Trust (1996) 222 ITR 22 (All).

chits. In *Dharmadeepti* cases[58] the Supreme Court examined various purposes of the organization and held that running of chits in the facts of the case was incidental or ancillary to the main object of promoting education and giving charity and the overall functions of the organization was promoting public utility. In contrast, in *Dharmopasanam* case[59] when the company had discretion to use the fund for either non charitable or more charitable purpose, and there was no clear evidence about use of fund for charity, it was not entitled to tax exemption. Again, scrutiny of purpose and identification of purpose for which fund is used provided a way of resolution of the problem[60].

A survey of case law on identification of charitable purpose under section 2(15) read with sections 11 to 13 point out that the process involves primarily examination of the purposes for which fund is used. The purposes like imparting of instructions in scientific principles or artistic skills [61] ; conducting music concert and running school, [62] establishing of hostels,[63] gifts for *samaradhana* or feeding,[64] gifts for erection of public wells,[65] gifts for bathing ghats and swimming pools,[66] gifts for planting and rearing shady trees,[67] for providing medical reliefs,[68] for hand spinning and weaving to relieve the poor[69]; for

58 Dharmadeepti v. CIT (1978) 114 ITR 454 (SC).

59 CIT v. Dharmopasamonam Co. (1978) 114 ITR 463 (SC).

60 R S Pathak J. in CIT v. Dharmodayam Co. (1977) 109 ITR 527 SC viewed that in examining whether a trust is charitable trust all the objects of the trust shall be referred to, and in case a particular object was never intended to be undertaken, the court shall ignore the object.

61 Victoria Technical Institute v. CIT (Addl) (1991) 188 ITR 57 SC.

62 CIT v Tyaga Brahma Gana Sabha (regd) (1991) 188 ITR 160 Mad.

63 Monie v. Scott LTR 43 Bom 281; Fanindra Kumar Mitter v. Administrator General of Bengal 6 CWN 321.

64 Ramaswami v. Aiyaswami AIR 1960 Mad 467.

65 Jama Bai v. Khimmji Vallabdas ILR 14 Bom.

66 Hemant Kumar Debi v. Gourishankar AIR 1946 PC 38; CIT v. Breach Candy Swimming Bath Trust (1955) 27 ITR 279 (Bom.).

67 Ramaswami v. Aiyaswami AIR 1960 Mad 467.

68 CIT v. Rajmitra Bhailala Amin Charitable Trust (1964) 54 ITR 241 Guj.

69 All India Spinners Association (1944) 12 ITR 482 PC; CIT v. Adarsh Gram Trust (1986) 159 ITR 41 Raj.

choultries and rest houses and for marriages of poor girls[70] have been considered as for charitable purposes. These, in fact promote economic, social and cultural rights of people. Charity's link with human rights is immensely demonstrated here. But when the trust deed vaguely refers to charity and social benefit of community hall, but the income derived from renting out the building as kalyan mantap is not applied for any charitable purpose, the assessee is not entitled to tax exemption.[71] This demonstrates objective conducting of purpose scrutiny by looking to the purpose of application of income.

The legal developments relating to the first three heads of charity have connections with values of welfare democracy. Relief of the poor need not be distribution of doles or alms. A scheme that employs unemployed agriculturists by providing them opportunity to work and earn income from spinning is relieving the poor. Under section 10 (23B) income of public charitable trust/ institution for development of khadi and village industry is not taxable.[72] Rehabilitating the economically handicapped women and destitute by setting up a unit of watch factory without intention to make profit is also relieving the poor[73]. The objective of aiding rural reconstruction work and cottage industry brings the trust within the scope of exemption head.[74] Private family trust helping out to meet marriage expenses is not relief of the poor.[75] As per the official circular, relief of the poor encompasses a wide range of objects for the welfare of the economically and socially disadvantaged or needy. It will therefore include within its ambit purposes such as relief to destitute, orphans

70 Jugal Kishor v. Lakshmandas Raghunathdas ILR 23 Bom. 659; Gordhandas v. Chunnilal ILR 30 All 111; CIT v. Bhartiya Khatri SewaTrust (1994) 205 ITR 96 (All).

71 Gangabai Charities v. CIT, AIR 1992 SC 1765.

72 All India Spinners Association v.CIT (1944) 12 ITR 482 (PC).

73 CIT v. Bhartiya Khatri Sewa Trust (1994) 205 ITR 96 All. CIT v. Gayathri Women Welfare Assoication (1993) 203 ITR 389 (Kar).

74 Thiagarajan Charities v. Addl. CIT (1997) 225 ITR 1010 (SC); ACIT v. Thanti Trust (2001) 247 ITR 785 SC; CIT v. Dharmodayam Co. (2001) 248 ITR 816 SC.

75 Gordhandas Govindram Family Trust v. CIT (1952) 21 ITR 231. But general charity to meet marriage expenses of the poor if good charity. See CIT v. Anand Swarup Brijendra Swarup Charitable Trust (1991) 187 ITR 656. All ; CIT v. Pt Ravi Shankar Misra Trust (1996) 222 ITR 252 All.

or the handicapped, disadvantaged women and children, small and marginal farmers, indigent artisans or senior citizens in need of aid.

Aid to education may occur in various ways. Establishing of free schools[76]; financial assistance to the poor and deserving students by way of scholarship grants for purchase of books[77]; encouraging the habit of reading[78]; spreading knowledge and art of classical music drama, painting, or modern fine arts[79] are the instances of charity for education. Education involves systematic instruction, schooling and training to popular the youth for the work of life[80], According to H.R. Khanna J, what education connotes in that clause is the process of training and developing the knowledge, skill, mind and character of students by normal schooling.[81] Professional journalism, political propaganda and private coaching do not come within its ambit.[82] Support to study ethical principles, promotion of Sanskrit study, of encouragement to students sports on the contrary, promote education.[83] However, a museum will not fall within the scope of education.[84] Under Sec 10(21) income of a scientific research association, which is applied wholly to the objectives for which it is established is not taxable. Under Sec 10(23C) iii ab and iii ad and iv, any income received on behalf of university or educational institutional whether funded by state or not, but existing solely for

76 Katra Education Society v. ITO (1978) iii ITR 420 All; CIT v. Sindhu Vidya Mandal Trust (1983) 142 ITR 633 Guj Rishi Chaitanya Trust v. Dy Director IT, (2003) 127 Taxman 89 Del.

77 CIT v. Saraswat Poor Studetns Fund (1984) 150 ITR 142 Kar.

78 IRC v. National Book League (1958) 24 ITR 461 (CA).

79 Varier PS v. CIT (1940) ITR 628 Mad; CIT v. Rao Charitable Trust (1976) 102 ITR 474 Kar; Royal Choral Society v. IRC (1944) 12 ITR Supp CA; VCS Kuchipudi Art Foundation v. Dy CIT (2011) 10 ITR 201 Chennai.

80 Loka Shikshana Trust v. CIT (11975) 101 ITR 234, 241 SC.

81 Ibid.

82 Ibid; Lokamanya Tilak Jubilee National Trust Fund, In re (1942) 10 ITR 26 Bom; CIT v. All India Hindu Mahasabha, (1983) 140 ITR 748 Del; Bihar Institute v. CIT (1994) 208 ITR 608 Pat.

83 Webber Re Barkly Bank v. Webber (1954) 3 All ER 712; Ecumenical Christian Centre v. CIT (1983) 139 ITR 226 kar; Ganeshi Devi Ram Devi Charity Trust v. CIT (1969) 71 ITR 696 cal; CIT v. Estate of PB Kayan Trust (1985) 155 ITR 60 Cal.

84 CIT v. Maharaja Savai Mansingh Museum Trust, (1988) 169 ITR 379 (Raj).

educational purpose and not for purpose of profit is not taxable. It should be noted that the spurt in the field of education by private educational institutions or self-financed educational institutions during the last three decades, emergence of private and deemed universities, the enactment of Right of Children to Free and Compulsory Education Act, 2009 and series of judgments reaffirming that educational institutions shall be administered on charity basis get support and stimulation from the facilitative role of tax exemption law.[85]

Two recent decisions have dealt with the issue of commercialization of education and extension of tax exemption. In the first case, the Income Tax Appellate Authority of Chennai observed, "the definition clearly shows that carrying on educational activities by itself is not a charitable purpose. The concept of charitable purpose may be manifested in different forms like relief of the poor, education, medical relief, etc, but a charitable purpose should always take care of the welfare and interest of the public and especially the poor section of the public. Running schools by collecting huge amounts of fees with five star facilities cannot be treated as charitable activity only on the ground that the business carried on by such institutions is the business of education."[86] In the second case, on the issue of surplus of income as not disentitling the educational institution from tax exemption, the Delhi High Court clarified that occurrence of surplus income in a particular year would not be ground for loss of status of charity.[87]

"Medical relief", according to Kanga and Palkhivala, "does not mean free treatment or treatment or at less than the ordinary price for all patients"[88] Running special wards for patients who pay full price is not fatal to the charitable

85 Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1; TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481; AIR 2003 SC 355; PA Inamdar v. State of Maharashtra AIR 2005 SC 3226.

86 M/s Rajah Sir Sannamalai Chettiar Foundation v. The Director of income Tax [Exemptions] ITA NO. 2927/Mds./2010.

87 St. Lawrence Education Society [Regd] and Anr. v. Commissioner of Income Tax Delhi [Central] and Anr. The Baptist Education Society and Anr. V. Chief Commissioner of Income Tax reported in [2011] 197 TAXMAN504 [Delhi].

88 Kanga and Palkhivala, Supra n.46 p. 532.

character of a hospital[89]. Under Sec 10(23C) income received by any hospital or other institution for the reception and treatment of persons sufficient from illness or mutual defectiveness or of persons during the convalescence or requiring medical attention and rehabilitation is not taxable.

The overall approach of the judiciary is towards exclusion of purely religious purpose, private gains and wholly commercial acts from the purview of the tax exemption law. By and large, the textual interpretation conforms to the tax policy of generating resources. Circumstances in decided cases point out the difficulty in bifurcation between religious and non-religious acts, and between business and charity, especially when such acts are intertwined or mutually related.

Types of Tax Benefits: Expansion Through Democratic Process

After knowing the legal concept of charitable purpose and the method of identifying the same in the light of legislative and judicial development, it is now appropriate to analyze the types of tax exemptions and deductions provided to the TSOs under the Income Tax Act. Since major changes were brought in the following items from (4) to (9) through amendments in response to public demands, democracy has played its role in extending tax exemption.

The benefits available to TSOs under Income Tax Act include:

(1) Exemption from taxation of income from property held for charitable or religious purpose (Sec 11);

(2) Exemption from taxation of voluntary contribution received for charitable or religious purpose (Sec 12);

(3) Exemption for scientific research associations (Sec 10(21) read with Sec. 35);

(4) Tax exemption for any income of an institution constituted as charitable trust or registered under society registration Act for the development of

89 IRC v. Peebleshire Nursing Association ITC 335,352 ; IRC v. Society for Relief for Widows and Orphans of Medieval Men II TC 1, 22.

khadi or village industries and not for purposes of profit, to the extent of donation made to certain funds either wholly or to the extent of fifty per cent as provided under the clause (Sec 10 (23B));

(5) Tax exemption for income received on behalf of various bodies like universities, hospitals, trusts (Sec. 10(23C));

(6) Deduction of the expenditure incurred by assessee by way of payment to an association or institution approved by National Committee for Promotion of Social and Economic Welfare Dept. GOI in respect of any eligible project or scheme (Sec 35AC);

(7) Deduction in the total income of an assessee to the extent of donation made to certain funds whether wholly or to the extent of fifty percent as specified in the clause with reference to purposes (Section 80 G);

(8) Deduction in respect of certain donations for scientific research or rural development (Sec 80 GGA);

(9) Deduction in respect of income of cooperative societies, either wholly or partially (Sec 80P).

The above categories of tax exemptions and deductions can be briefly discussed to point out that the social purpose underlying tax law needs support from purposive application of tax benefits. The requirement of registration, exclusions of private religious purpose, partisan approach and private benefit from tax exemption and restraints on modes of investment are some of the factors that keep tax exemption to charity free from abuse. From the angle of right to equality, which is a major component of democracy, this has great significance.

1. Legal requirements to be satisfied for claiming tax exemption under section 11 and 12

The requirements to be satisfied by NPVOs to avail the benefit of sections 11 and 12 are crucial for patrolling them against possible abuses like augmenting the interest of private religious act at the cost of public revenue; practising caste/ community based discrimination with the help of public revenue; carving out personal or family benefit in the name of state supported charity. All these policies of excluding the abuses have dimensions of secularism, human

rights and public welfare. In order to filter out the undeserving NPOVs, the requirement of registration of them and the method of registration have also been contemplated. From this perspective, the requirements under section 13 and 12A become significant. This can be discussed as follows:

i)Exclusion of private religious purpose

According to section 13 (i) (a) any part of the income from the property held under a trust for private religious purposes which does not enure for the benefit of the public will be disqualified for tax exemption under section 11 and 12.

In view of the fact that tax exemption is State's indirect economic support to charity, basic approach of secularism that religion based discrimination shall not be practiced has moulded the above policy to distinguish between private and public religious purposes and confine the tax exemption to the latter only. Two limbs of secularism, viz., non-establishment of religion and free exercise of religion appear to have made this kind of impact.[90]

In *State of Kerala* v. *MP Shanti Kumar Jain*[91], a case under Kerala Agricultural Income Tax Act which contained a provision similar to section 13(i) (a), the Supreme Court held that when a trust is meant for propagation of Jain religion and medical relief under the deed was available only to followers of Jain religion and benefit to non Jains was available only if the family which managed the trust sympathized and approved such extension, the trust was for private religious purpose without conferring benefit to the public. The Gujarat High Court in a case has characterized the features of public religious endowment as including: dedication of the endowment property for the use or benefit of the public; benefit being vested in an uncertain and fluctuating body of persons

90 While tax exemption to private religious purpose reduces public revenue without justifications in terms of benefit to public, and amounts to State's alignment with religion which it ought not establish, denial of tax exemption to public religious purposes obstructs right to free exercise of religion. For relation between these clauses, see P Ishwara Bhat, *Fundamental Rights* (Kolkata: Eastern Law House, 2004) ch. 11.

91 AIR 1998 SC 2208.

in contrast to benefit to ascertained individuals or worship of family god[92]. A private trust created under the family partition to upkeep seven temples was regarded as trust for private religious purpose which does not enure for the benefit of the public.[93]

The Indian legal position about non availability of tax exemption for advancement of religion has textually deviated from the English law of charity where it is one of the heads of charity. In view of the fact that traditional Hindu law and Muslim laws have also not distinguished between secular charity and religious charity[94] judiciary narrowed down the exclusion of tax exemption to private religious charity. The words in section 13 (1) (a) provide for this position under the present law. In fact, culturally and in social practice such distinction between secular charity and religious charity is not prevalent. The Constitution also recognizes public religious charity and endowments. State has responsibility to eradicate untouchability in Hindu religious institutions thrown open to the public. The social utility of religion and people's public participation in religious life also speak much about social side of religion. As a result, artificial distinction between secular charity and religious charity in the name of secularism has practical difficulties. When both are grounded in morality and welfare, how religious charity is less important than secular charity is difficult to understand. As Ramachandra Iyer J observed in *Thangaswami*, "…..a temple does help the spiritual and moral advancement of the section of people who resort to it. Such advancement could not be regarded as in any sense less than the material advance of those people. If an endowment for the

92 CIT v. Giridharram Hariram Bhagat (1985) 154 ITR 10 Guj; also see Ghulam Mohidin Trust v. CIT (2001) 248 ITR 587 (J&K).

93 Kizakka Kovilakam Trust v. Assistant CIT (2002) 256 ITR 238 (Kar).

94 According to Madras High Court, "there is really no distinction, according to the Hindu concept, between a secular and religious charity. This is more particularly so in the case of a gift for the purpose of construction or renovation of a temple, for such a gift not merely secures merit to the donor, from a religious point of view, but serves to benefit other worshippers therein, when such a temple happens to be a public one." Thangaswami v. CIT AIR 1966 Mad 103; the belief in karma philosophy also obliterates the distinction between charity and religion since doing good through charity brings spiritual benefit. See B. K. Mukherjea, *The Hindu Law of Religious and Charitable Trusts*; 5th Ed(Kolkata: Eastern Law House,1983, 2003) pp.11-2. Similar approach holds good in so far as Muslim endowments also; see Trustees of Tribune Press Lahore v. Commr. of Income-tax, Punjab, (1939) 7 ITR 415 : (AIR 1939 PC 208).

material advancement of a section of the public can be regarded as a public utility, we fail to see why a contribution for the construction or renovation of a temple cannot be regarded as such."[95] Accordingly, the Court exempted the donation to temple construction from taxation.

The exclusion of private religious purpose from tax exemption has attracted the private-public distinction in religious acts and worship with considerable uncertainties of outcome based on facts of each case.[96] This dichotomy is unavoidable, and a careful case to case approach is required. Again, the social reality that Indians have the tendency of dedicating the private religious facility to the public use or sharing it with the larger community has gradually tilted the development in favour of public use.

ii) Exclusion of benefit to particular religious community or caste

According to sec 13(1) (b) the benefit of section 11 and 12 shall not be available in the case of trust for charitable purposes or a charitable institution created or established after the commencement of this Act if the trust or institution is created or established for the benefit of any particular religious community or caste.

In *CIT v. Palghat Shadi Mahal Trust*[97] the Supreme Court considered that the trust created for the educational, social and economic advancement of the Muslims and for religious and charitable objects recognized by Muslim law was coming under the prohibited category of section 13(i) (b) and declined to provide tax exemption under Sec 12. It was also held that Explanation 2 to section 13(7), which declares that the trust or institution established for the benefit of SC/ST, BC women and children shall not be deemed as benefiting a

95 Thangaswami v. CIT AIR 1966 Mad 103 at 110.

96 Babu Bhagwan Din v. Gir Har Saroop, AIR 1940 PC 7 where the temple was regarded as private in spite of allowing of its visit by public; Madras HRE Board v. Devianai Ammal, AIR 1954 482 where existence of gopuram of temple, utsava idols and puja by paid archakas did not make the temple public as it was new and dedication to public was not clear. CIT v. Sri Dwarakadheesh Temple (1946) 14 ITR 440 where dedication to and use by public were clear, it was held as public religious institution.

97 AIR 2002 SC 737.

religion or community, is not applicable in the facts of the case as the Muslims were not backward community. The judgment is comparable to *Bob Jones University* case[98] of America, where the benefit of charity was available in the University exclusively to followers of Christian religion, the US Supreme Court disallowed tax exemption on grounds of invidious discrimination and religion-based preference. The partisan approach of the trust could not be supported by the state action because of State's commitment to the principle of equality.

Clause(1) (b) is not applicable in case of institutions established or trusts created prior to 1962 even if it is for the benefit of any particular community. The clause is also not applicable when the trust/institution is created for the public but trustees are directed or given discretion under trust deed to give preference to the members of particular religion, community or caste, other things being equal.[99] In identifying any community as religious community, regard shall be had to the issue whether the community considers abiding by a particular faith as a requirement to become member of that community.[100] It is only religious community or caste, but not linguistic group that is barred from the tax exemption.[101]

iii) Exclusion of personal benefit and family aggrandizement

The tax exemption under sec 11 and 12 will not be available also in circumstances where the income of the trust for charitable or religious purposes or of a charitable or religious institutions ensures or applied directly or indirectly for the benefit of author or founder of the trust, his family members, trustee, manager, relative of any of these persons or substantive contributor. The words 'applied for the benefit' have implication under section 13(2) to include range

98 Bob Jones University v. United States 461 US 574; 76 L Ed 2d 157 (1983).

99 Trustees of Charity Fund v. CIT 36 ITR 513 (SC) ; CIT v Meghji 37 ITR 419; CIT v. Kamla Town Trust 217 ITR 699 (SC) "When any property is settled for charitable purposes for catering to the needs of a class of public which is poor and needy, any preference given to poor and needy workmen of the Settlor Company would not necessarily detract from the charitable object underlying such bequest or settlement."

100 Shantagauri Ramniklal Trust v. CIT 239 ITR 528.

101 CIT v. Gurajarthi Mandal, (1995) 213 ITR 492 Guj.

of activities like borrowing money, getting lease, receiving salary, sale of share, security or property to trust for an excessive consideration, purchase of share, security or property from the trust for less than adequate consideration or diversion of income or property of trust to persons referred above. The idea underlying the legal provision is that charity shall not be used for personal gain nor it could be used as conduit pipe to get public advantages like tax exemption ultimately pouring such benefit to the initiator of charity scheme. The rationale is comparable to what Ramaswami J held in a case relating to section 92 of CPC, "Charity is active goodness - the doing good to our fellow men, fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general or to any class or portion of mankind."[102]

iv) Requirement of investment only in permissible scheme

Another requirement for qualifying for tax exemption for charitable or religious institutions or trust is that the fund of the trust should not have been invested in any form or mode other than those recognized under sec 11(5), which involve categories of investment in governmental or public schemes.

v) Requirement of registration under the income Tax Act

The final requirement, rather the threshold requirement to be fulfilled for claiming tax exemption under sec 11 and 12 is that the concerned trust or institution created[103] for charitable or religious purpose should have been registered with the Income Tax Authorities or should have filed application for the purpose of registration (Sec 12A and 12AA). Registration serves the purpose of establishing identity of the trust and does not prevent the Assessing Officer from considering whether the assessee is entitled to the benefit of section

102 Ramaswami v. Aiaswami, AIR 1960 Mad 467.

103 A formal deed of trust is not absolutely essential to constitute a trust (Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC). Manifestation of intention to create trust and formal vesting of ownership is sufficient (CIT v. Sant Baba Mohan Singh (1979) ITR 1015 All); when a trust is in existence for several decades, and no documentary evidence is available a declaration by the existing trustees to that effect is adequate (Laxminarayana Maharaj v. CIT (198 G) 150 ITR 465 (MP).

11 and 12.[104] Where the total income of the trust or institution in a financial year exceeds the maximum amount which is not chargeable to income tax, the requirement of furnishing audit report is contemplated[105]. The procedure for registration involves submission of application by the person in receipt of the income; calling for such documents and information by the commission in order to satisfy himself about the genuineness of the activities of the trust or institution passing of written order registering the institution in case of satisfaction; and refusal in case of being not so satisfied[106]. Refusal to register without valid reasons renders the order invalid. [107] Failure to pass orders within six months will be presumed as grant of registration.[108]

2. Tax exemption for any income of a scientific research association [Section 10(21) read with Sec 35(1)]

In order to support NPVO activities that assist and promote scientific research, law gives an incentive of tax exemption. Any income of a scientific research association, which has its object the undertaking of scientific research, and is registered in India and recognized by the Central Government, shall not be part of taxable income. This is subject to a proviso that the scientific research association (1) applies income or accumulates it for application wholly and exclusively to the objects for which it is established; and (b) does not invest or deposit its funds other than in recognized modes. It is not necessary for tax exemption under sec 10(21) that the income should be spent in the relevant year itself.[109]

104 New Life in Christ Evangelistic Association v. CIT (1190) 185 ITR 63A (All); the requirement of registration for the purpose of section 11 is different from that of Sec 80G. M.K. Nambyar SAARC Law Charitable Trust v. Union of India (2004) 269 ITR 556 Del; M. Visveswaraya v. ITAT 25 ITR 852.

105 Section 12 A (b).

106 Section 12 AA ; In case the commissioner is satisfied that the activities of the trust or a institution are genuine he may cancel registration after giving reasonable opportunity of hearing Ajit Education Trust v CIT (2010) 42 SOT 415 Ahd; Oxford Academy of Career Development v. CCIT (2009) 315 ITR 382 (All).

107 Shantagauri Ramniklal Trust v. CIT 239 ITR 528.

108 Rev. Father Trust Oscar Coalesce Memorial Medical Association v. CIT Thane (2009) 31 SOT Mum; Society for Promotion of Education v. CIT (2008) 171 Taxman 113 All.

109 Dalmia Institute of Scientific and Industrial Research v ITO (1979) 118 ITR 575 Or.

3. Tax exemption for income of Khadi and Village Industry NPVOs [Section 10 (233)]

There is a large number of trusts and societies registered under the Societies Registration Act 1860 or other corresponding State laws contributing to the ideal of rural uplift by involving khadi and village industry activities inspired by Gandhian thoughts. Under section 10(23B) any income of such institution existing solely for the development of khadi or village industries or both, and not for the purposes of profit to the extent it is attributable to the business of the production and marketing shall not form part of taxable income. However, such institution needs to be approved for the purpose by the Khadi and Village Industries Commission.

4. Tax exemption for income of educational institutions, hospital and public religious institutions (Sec 10(23C)) which are not for profit

The NPVOs whose income is exempted under sec 10 (23c) from payment of tax are as follows:

(a) any university or educational institution existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of such university or educational institution do not exceed the annual amount prescribed by the authority [10(23c) iii ad]

(b) any hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation existing solely for philanthropic purposes and not for purposes profit, if the aggregate annual receipts of such hospital or institution do not exceed the amount of annual receipts as may be prescribed [sec 10 (23 c) ii ae]

(c) any other fund or institution established for charitable purposes which may be approved by prescribed authority (Chief Commissioner), having regard to the objects of the fund or institution and its importance throughout India or throughout any state or states[Sec 10 (23 C) iv]

(d) any trust (including any other legal obligation) or institution wholly for public religious purposes of wholly for public religious and charitable purposes which may be approved by the prescribed authority (Chief

Commissioner) having regard to the manner in which the affair of the trust or institution are administered or supervised for ensuring that the income accruing thereto is properly applied for the objects thereof.

The support to human rights and social justice is implicit in charity's function of relieving the people from disease, and influencing their minds through education.

5. Deduction of payment made to associations or institutions approved by Government of India for carrying out welfare projects or schemes

Outsourcing of the welfare projects and schemes by using the NPVOs is significant development that has taken place post LPG (Liberalization, privatization and globalization). Accommodation of consequent change in the Income Tax Law can be found in Section 35AC. Section 35AC contemplates that an association or institution (parallel to public sector company or local authority) approved by the National Committee for Promotion of Social and Economic Welfare, Department of Revenue, Government of India may carry out any eligible projects or schemes and that the payment made by the assesee to such association or institution for the said work shall be deducted as expenditure. The National Committee has the power of conferring and withdrawing approval to such association or institution after objectively verifying the facts. As a corollary to section 35AC relevant provision can be found in section 80GGA (2) (bb) providing for deduction of such payment from the taxable income of the assessee. The incentive given to welfare activity outsourced through NPVOs is noteworthy.

6. Tax deduction for donations made under section 80G.

Section 80G is a popular omnibus clause providing for deduction in respect of donations made by assessees to various National and State Funds which aim to bring reliefs in circumstances of natural calamities, to assist national efforts to relieve from illness, to promote communal harmony, sports, culture, education, technology, family planning, urban and rural housing and to support NPVO activities for charitable and religious purposes.

7. Deductions in respect of certain donations made to associations for scientific research or rural development.

Scientific research associations, educational institutions, associations working for conservation of natural resources or afforestation and associations carrying out the programmes of rural development are the NPVOs contemplated in Section 80 GGA, donations to whom beget deduction from the total income of donor assesses. Again, the idea is to extend tax benefit incentive to donors so that the developmental acts will be nourished by the society.

8. Deduction in respect of income of cooperative societies

Cooperative societies are grass root rural organizations vital for the health of rural economy. Realizing the need for supporting them through tax benefit measures, Parliament has added section 80 P. This provision has the policy of allowing deduction of profits and gains of business made by cooperative societies either wholly or partly depending on the categorization under sub section (2) of section 80 P.

In the first category there are cooperative societies engaged in (i) banking business or providing credit facilities to its members; (ii) cottage industry ; (iii)marketing of agricultural products grown by the members ; (iv) purchase of agricultural implements, seeds, livestock or other article intended for agriculture for the purpose of supplying them to its members; (v) the processing without aid of power, of the agricultural produce of its members; (vi) the collective disposal of the labour of its members; and (vii) fishing or allied activities such as catching, curing, processing, preserving, marketing and purchase of necessary materials for supplying them to its members. The whole of the amount of profits and gains of business attributed to any other or more of such activities engaged by this category of cooperative societies shall be deducted while computing the total income of the assessee, which is a cooperative society. In Bangladesh, where lots of developments have occurred in the matter of micro credits and cooperative societies, similar provisions can be found.[110]

110 Section 47 of the Income Tax Ordinance 1984, Bangladesh.

Conclusion

Democratic values, institutions, and practices have inherent tendency to respond through the process of re-democratization, to the challenges on protection of human rights and welfare objectives. The triangular relations amidst state, society and TSOs have helped in this process. The tax exemption law, which is a part of the contribution of such relation, has greatly supported the financial autonomy and economic viability of TSOs and upheld the cause of human rights and welfare. Democratic process of lobbying, consultation, and negotiation continues to influence formulation of such policy. Because of the realization of State-TSO partnership in the matter of protection of human rights and welfare, there is great synergy in the concerted efforts. The grass root non-profit institutions in the social pyramid, whether fulfilling the socio-cultural aspirations or economic objectives of self-help, get ongoing nourishment from tax exemption law. Keeping the democratic features alive is an enduring responsibility of vigilant civil society. Clear features of progress rather than regress are visible in the Indian legal development on tax exemption policy vis-à-vis democratic process.

As components of democratic value, secularism and equality have played their cardinal role in moulding the tax exemption law. Law has made distinction between public religious purpose and private religious act. At times, such distinction has become artificial, non-viable, and confusing. While the former is given tax exemption, the latter is denied of such advantage. Liberal construction of public religious purpose has satisfied the popular view about, and social function of religion. Abuse of tax exemption policy by undeserving organizations pose problems, and require to be dealt by more rigorous control. However, the policy that private benefit activities and substantive commercial activities shall not avail tax exemption in the name of charity is in accordance with the principle of equality and promotes democratic spirit.

The expanding heads of charity, by inclusion of ecology and cultural heritage, have responded to the people's demands. Inclusion of new clauses recognizing educational institutions, research organizations, universities, hospitals, social

service bodies implementing the national schemes for the purpose of tax exemption has reflected the outcome of the economic policy of liberalization and privatization. Support to khadi and village industry organizations and cooperative societies are also strengthening the structure of democracy. It is significant to note that in the above crucial developments in tax exemption law, the interactions between law and public opinion, state and society or government and TSOs have demonstrated and reiterated democratic feature. Between the extremes of highly liberal tax exemption policy and rigid pro-revenue approach, a fair balance has been struck in this sphere.

Dawn of a Claim of Legitimate Expectation of Fundamental Right to Property in Land - A Myth or Reality Under the Original Constitution of India

Y R Rajeev Babu[*]

Introduction

The Doctrine of Eminent Domain raises a common question of powers of State versus Individual Rights. In the background of alleged indiscriminate acquisition of land and payment of inadequate compensation, the poor citizens and agriculturists have resorted to violent protests[1] in order to defend their meagre land-holdings against compulsory acquisition by the Government in India. These issues have recently gained the heat in the background of latest landmark judgements of the Supreme Court of India and the High Court of a State,[2] lately enacted The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and alleged indiscriminate conversion of agricultural land for non-agricultural use threatening the food security in the India.

The Indian Constitution[3] under Article 300A[4] necessitates only one restriction on the power of eminent domain, that is, "Authority of Law". The outcome is if

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1 Riots and killings in Singur and Nandigram in the State of West Bengal, Tribals Stage Protest against Tata Steel Project in Kalinga Nagar,Orissa.

2 Tata Motors Ltd., v. State Of West Bengal, MANU/WB/0777/2011(High Court of West Bengal); the Supreme Court, in an appeal challenging the quashing of the Singur Land Acquisition Act by the Calcutta High Court, on July 10, 2013 directed Tata to return Singur land and that the land should be given back to the agriculturists; Radhey Shyam v. State of U.P, (2011) 5 SCC 553 (Supreme Court of India).

3 Adopted on 26th November, 1949 and came into force on 26th January, 1950.

4 Inserted by the 42nd Amendment to the Indian Constitution, 1978 and runs thus "No person shall be deprived of his property save by authority of law".

property is taken away by the executive order without the authority of law the aggrieved person can't move the Supreme Court under Article 32, his remedy would be to move to the High Court under Article 226 or by a civil suit. Though the legislature is under the constitutional obligation to pay compensation under Article 300A it is not a basic structure of the Constitution. Right to property is a human right and Constitutional right and can't be taken away except in accordance with law. Authority of law under the Article 300A would mean valid law. The repealed Land Acquisition Act, 1894 and lately enacted The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 imposes a duty to pay compensation expeditiously but its Justiciability is within the provisions of the Act. The consequence of this is that if a person's land is taken away without paying compensation to accommodate another private person or non government organization, the former has no effective constitutionally enforceable remedy.

The above alarming events and developments, which are being unfolded from the recent past, raise the question whether the people of India had a claim of Legitimate Expectation of fundamental right to property, which was explicitly adopted in the original Constitution of India under Articles 31 and 19(1)(f)[5]. It may also be of relevance whether a legitimate expectation of Fundamental Right to obtain or receive compensation arose under the original Constitution of India. An attempt has been made in this paper to find out possible and objective answers to these questions.

This involves, firstly, enquiring into briefly whether our constitution provides for the claim of Legitimate Expectation in general. In Union of India and Ors. v. Hindustan Development Corporation and Ors[6], it was held "If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known

5 Articles 31 and 19(1)(f) were deleted by the 42nd Amendment to the Indian Constitution, 1978.

6 AIR 1994 SC 988.

grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference." This view was reiterated by the Supreme Court of India in several other cases.[7]

Secondly, it examines as to whether Indian constitution, in the original form, entitles the people of India for the claim of Legitimate Expectation of fundamental right to property in particular. In this respect, the study may be carried out broadly on three premises. The first premise is the fact that Right to Property was a Fundamental Right in the original Constitution of India and intention of the Founding Fathers of our Constitution was to make Right to Property as a Fundamental Right. As such, it seemed to have given rise to a ground for a claim of Legitimate Expectation of the people that the Government would not deprive the people of their fundamental right to property and compensation. The second premise is that the legislative action on land reforms movement having been substantially achieved the legitimate expectation in India is to reinstate right to property as a fundamental right in the constitution. The third premise is that a long consistent enjoyment of property by the people of India and a consistent policy of the state of non interference with the enjoyment of property have entitled the people, who were benefited from the land reforms as well as those who have lost the excess of land under the land reforms, for the claim of legitimate expectation of fundamental right to property.

An endeavour has been made in this paper to give an insightful account particularly on the first premise. In doing so, an objective enquiry has been attempted to find out reasons and answers, firstly, as to why Indian Constituent Assembly and Founding Fathers of Indian Constitution resolved to adopt the fundamental right to property in the Original Constitution of India when majority of the people in India were landless labourers or agriculturists at that

7 Bannari Amman Sugars Ltd v. Commercial Tax Officer, 2005 (1) SCC 625; MRF Ltd., Kottayam v. Assistant Commissioner, 2006(8)SCC702.

time. Secondly, whether the founding fathers of the Indian Constitution had promised the people of India fundamental right to property. In other words, it is attempted to enquire into whether the original Constitution of India had given rise to a Legitimate Expectation of fundamental right to property. Thirdly, whether the idea of fundamental right to property had been derived from any other foreign Constitutions, if yes, why those countries have adopted the Right to Property as a Fundamental or Justiciable Right to Property in their constitutions. Fourthly, whether the Constitutions of those countries have given rise to a Legitimate Expectation of fundamental right to property in their respective states.

Legitimate Expectation Over 'Right To Property'

In general, there are three kinds of interferences by the state with the right to property in land of the people. Firstly, a Government may interfere by expropriating or compulsorily acquiring the existing property of individuals with or without compensation when public interest requires. Secondly, the Government may control the use of property by police power regulation. Thirdly, when the Government interferes with the substance of property.[8] For example, provisional transfer of agricultural land does not amount to deprivation, although provisional transfer of lands takes a very long period (for example sixteen years). It means that the owners no longer enjoy the benefit of ownership in practice; however, the owners retain the hope that they might one day recover their full property rights.[9] It is pertinent to notice that it is the first kind of interference by the Government, which has been the most controversial and which has drawn the massive resistance not only by the people whose property has been interfered with but also by those who have championed for the individual basic and fundamental rights.

8 This type of interference for the first time invented in Sporrong and Lonnroth v. Sweden, Judgment Of 23 September 1982, Series A, No. 52 Ss 63-65, As cited in Ali Riza Çoban, Protection Of Property Rights Within The European Convention On Human Rights (2004) P.187.

9 Poiss v. Austria, judgement of 23 April, 1987, Series A, No.117, as cited in Supra note 8.

Though state has the powers of eminent domain, these powers have to be exercised sparingly and only after fulfilling certain conditions. Different states prescribe different conditions for the exercise of the powers of eminent domain and the nature of those conditions depend upon the polity, use of land, agricultural and land reform policies, and economic conditions of the state concerned. However, there are certain common conditions with some variations, which have been contemplated in most of the legal systems in the world. Some of such common conditions may be illustrated as public interest, compensation, legitimate expectation, principles of proportionality and necessity test. One of such common conditions i.e., honouring the legitimate expectation of the people has been taken up in this paper for evaluation in the background of the above mentioned state of affair in India.

Honouring legitimate expectation has been considered as a manifestation of fairness and good administration.[10] The claim of legitimate expectation, in the case of representations as to the substantive outcome in a case, requires that a public decision-maker act consistently and rationally. It is appropriate for the authority to abide by its representations and policy when made in general terms and to the world at large. It is suggested that more appropriate for a legitimate expectation to be based upon an established course of conduct in the past, rather than any specific promise as to conduct for the future. [11] However the Lord Justice Laws held that substantive legitimate expectation will only arise where there has been a specific undertaking that is pressing and focussed in nature and is directed at a particular individual or group, by which the continuation of the relevant policy is assured.[12]

A distinction has been drawn between the paradigm case and the secondary case of procedural legitimate expectation.[13] The paradigm case refers to the

10 Jonathan Moffett, Resiling From Legitimate Expectations, 4-5 Gray's Inn Square. Available at http://heinonline.org/HOL (Accessed March 24, 2014).

11 O'Reilly v. Mackman [1983] 2 AC 237, 275, as cited in legitimate expectations, Philip Sales, First Treasury Junior Counsel, Common Law Lecture for ALBA, 7 March 2006. available at www.adminlaw.org.uk (Accessed March 24, 2014).

12 R (Niazi) v. Secretary of State for the Home Department [2008] EWCA Civ 755, as cited in Jonathan Moffett, Resiling From Legitimate Expectations, 4-5 Gray's Inn Square.

13 Lord Justice Laws in R (Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755, as cited in Supra n. 12.

circumstances where a public authority has provided an unequivocal assurance of giving notice or consulting before it changes an existing substantive policy,[14] and the secondary case refers to that where the procedural legitimate expectation arises out of a benefit or advantage that the claimant has in the past enjoyed. For a secondary cases of legitimate expectation to arise, the impact of the public authority's past conduct on the claimant must be pressing and focussed, such that the relevant individual or group could in reason have substantial grounds to expect that the substance of the policy will continue to inure for their particular benefit.[15] Lord Justice Sedley[16] considered that in addition to having legitimate expectation that the policy as it stands will be fairly applied to his particular case, an individual may also have a legitimate expectation that if the policy is changed to his disadvantage, the alteration must not be effected in such a way that unfairly frustrates any reliance he has legitimately placed on it. It has been said "the protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in the government's dealings with the public".[17]

The European Court of Human Rights has supplied credence to the doctrine of legitimate expectation by holding that Article 1 of Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms, 1950 was capable of protecting a legitimate expectation that a certain state of affairs will apply.[18] In Pressos Compania Naviera SA v. Belgium[19] the European Court of Human Rights demonstrated the breadth of the concept of property or possessions.[20]

14 Ibid para 29.

15 Ibid para 49.

16 Ibid para 68.

17 De Smith's Judicial Review (6th ed., 2007), para 12-001. See also Craig and Schønberg, Substantive Legitimate Expectations after Coughlan [2000] PL 684, 696-697, as cited in Supra note 12.

18 Pine Valley Developments Ltd v. Ireland, A 222 (1991), as cited in Aida Monica Carss-Frisk, The right to property, A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human *Rights* by. Human rights handbooks No. 4, 1st edition, June 2001.

19 A332 (1995), as cited in Supra n. 18.

20 A statute (The Act of 30 August 1988) was held to be an interference with the right to

The Kantian view argues that frustration of one's reasonable expectations causes anguish, destabilization, and demoralization. Respect for someone's humanity, therefore, must take that person's reasonable expectations into account. Respect for someone's reasonable expectations conveys a commitment to that person.[21]

According to Roscoe Pound the Expectations are created by the conduct of the people and it results from the general culture of society. The legal recognition of expectation is not a necessary and sufficient condition for the existence of expectation. Roscoe Pound explains his views in the following words:

'*Apart from philosophical or metaphysical ethical considerations, a person may have reasonable expectations based on experience, or on the presuppositions of civilized society, or on the moral sentiment of the community. Some one or all of these may be recognized and backed by the law whereby they become more reasonable.*'[22]

It is interesting to note that the above view of Roscoe Pound that the conduct of the people and culture of society give rise to the claim of reasonable expectation was also recognised by the Indian Judiciary with respect to right to property, which, according to the concept of property developed by the European Court of Human Rights[23], consists of claim of legitimate expectation. This is evident in the opinion expressed by the Justice Mathew in the milestone *Keshavananda Bharathi Case*[24] *where he adverted that the concept of property is not an arbitrary ideal but is founded on man's natural impulse to extend his own personality. In the long run, a man cannot exist, cannot make good his right to marriage or found a family unless he is entitled to ownership through the acquisition of property.* He came to the conclusion that as a general principle applicable to all the stages of

property, as it prevented the applicants from enjoying the rights they had had before the said statute, as cited in Supra note.

21 Immanuel Kant, Groundwork of the Metaphysics of Morals (trans. and ed. by Mary Gregor, 1997), as cited in Daphne Barak-Erez, The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests, European Public Law, Volume 11, Issue 4 583. available at http://www.tau.ac.il/law/barakerez/articals/legitimate.pdf (Accessed March 24, 2014).

22 Roscoe Pound, Social Control through Law (1942) 80, as cited in Supra note 21.

23 Pine Valley Developments Ltd v. Ireland, A 222 (1991), as cited in Supra note 18.

24 (1973) 4 SCC 225 page 884 at paras 1725 & 1727.

social development, there can be no individual liberty, and that without some property or capacity for acquiring property and without some liberty there can be no proper development of character.

The legal position in India is more or less the same as in England and elsewhere. The doctrine of legitimate expectation has been evolved over period of time in different cases decided by the Indian Courts. The Supreme Court,[25] while recognizing the doctrine allowed an aggrieved party to seek judicial review, said, "*If one could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to comment such reasons*". The Supreme Court of India[26] acknowledged the doctrine of legitimate expectation by referring to the English cases *viz., Council of Civil Service Unions and Others v. Minister for the Civil Service*[27] *and In re Preston*.[28] In another case,[29]The Apex Court further elucidated that the legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence and such expectation should be justifiably legitimate and protectable. A policy may be changed in overriding public interest. However, the principles of Wednesbury reasonableness would be applicable when there is a change in policy defeating substantive legitimate expectation. [30]

Right to Property Debate and the Constitution of India

With regard to the issue as to why Indian Constituent Assembly and Founding Fathers of Indian constitution resolved to adopt the fundamental right to property in the Original Constitution of India when majority of the people in

25 Navjyoti Coop. Group Housing Society v. Union of India (1992) 4 SCC 477 at 494.

26 Food Corpn. of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71.

27 1985 A.C. 374 (H.L.), as cited in Food Corpn. of India v. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71.

28 Ibid

29 Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499.

30 M.P. Oil Extraction v. State of M.P, (1997) 7 SCC 592.

India were landless labourers or agriculturists at that time, it is to be appreciated that there were convincing and legitimate reasons and well-founded forces in India, which necessitated the Constituent Assembly and Founding Fathers of Indian constitution to resolve to confer the fundamental right to property on the people under the Original Constitution of India.

There had been an intense debate in the Constituent Assembly on the controversial fact that many estates in the country and particularly in Oudh were acquired by the present holders as rewards for their traitorous support to the English during the Mutiny of 1857. The big landlords and the Zamindars who did not get their land by hard labour exploited the tenants and labourers.[31] There had been also huge number of absentee landlords in India for instance in Bengal and of Jeypore zamindari in Orissa.[32]

The original Indian Constitution now repealed, Article 31(2) had reproduced a part of Section 299 of the Government of India Act, 1935. People of India had some experience of the working of Section 299 of the Government of India Act. When some Acts were passed by some local legislatures to abolish Zamindari System, the law prevailing was the Government of India Act of 1935, viz., section 299.[33] The Article 31(2) in the original Constitution was

31 V. C. Kesava Rao, on 2.5.1947 during Constituent Assembly Debates, Discussion on Clause 19 of the Fundamental Rights. interim report on fundamental rights, Constituent Assembly of India Debates (Proceedings) - Vol.III.

32 Lakshminarayan Sahu, Ibid.

33 Mahboob Ali Baig, on 10.9.1949 during Constituent Assembly Debates, Constituent Assembly of India Debates (Proceedings) - Vol. IX. The repealed original Article 31(2) ran as follows: "No property… shall be taken of or acquired for public purpose under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given." Source: M.P. Jain, Indian Constitutional Law, Vol. 2 (6th ed., 2010). The Section 299(2) of the repealed Government of India Act, 1935 ran as follows: "Neither the Federal nor the Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purpose of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides, for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined." Source:lawmin.nic.in/legislative/textofcentralacts/GOI%20act%20 1935.pdf (Accessed April 23, 2014).

supported in the Indian Constituent Assembly in the larger interest of the toiling population. The limited objection to this clause was made only in the background that the Congress Provincial Governments had already prepared their Bills for the abolition of Zamindari system and then when Constitution was being framed for free India, compensation was sought to be paid to them in the manner in which the law fixed.[34] However, this compensation clause did not cover Zamindari alone but it covered the whole field of movable and immovable property in the country.[35] It is clear from the words of Sardar Vallabhbhai Patel,[36] who explicitly declared that this Article 31(2) would become law only after most of the zamindaris would be abolished as the process of acquisition was already there and the legislatures were already taking steps to liquidate the Zamindaris and it would take at least a year or more for this Article to become a law. He further declared that it was wrong to think that this Article was intended really to safeguard the interest of Zamindars. He submitted that in the different provinces legislations were being brought in to liquidate Zamindaris either by paying just compensation or adequate compensation or whatever the legislatures there thought fit.

This goes to illustrate that the Indian Constituent Assembly adopted the fundamental right to property in the Constitution under the due consideration of the facts that there were huge population of landless agricultural labourers, tillers and several instances of absentee landlords. There was an immediate necessity for the drastic legal measure to abolish concentration of lands in the few hands and to distribute such lands to the landless tillers and thereby encourage the overall progress in the economy of the country and this could be done only by firmly assuring and conferring upon the people a constitutionally guaranteed right to property. Even before the Indian constitution was drafted and came into force there were laws already pending in or were being enacted

34 V. C. Kesava Rao, Supra n. 31.

35 Rai Bahadur Syamanandan Sahaya, Supra n. 31.

36 While replying to the concerns raised by the members on the clause 19, Supra n. 31.

by different states[37] to abolish of zamindari system and to make tillers of land as owners.[38] Furthermore, these Acts were passed by some local legislatures and the law prevailing was the Government of India Act of 1935, section 299.[39]

It was firmly believed that there was a primary constitutional responsibility to safeguard the proprietary rights of all the people in particular the large number of tillers of the land who were going to be benefited from abolition of zamindari system and absentee landlords. It was also argued that the entire economy of the country depended upon the proper enforcement of this Fundamental Right under Article 31.[40] The relevant provisions in the original constitution were based on the assumption that stability in property rights was for the good of the society.[41]

The subject of compensation had been engaging the attention of various political parties, press, government, Prime Minister and the Constituent Assembly in India for many years.[42] There was a commonly acknowledged demand from all the quarters that there should be some sort of guarantee that if and when such properties or undertakings were acquired by the State a fair and equitable compensation would be paid.[43] It is worth mentioning that the certain final and definite decisions had been reached and principles had been laid down and the Drafting Committee was to draw up an Article in accordance therewith. Those final definite decisions and principles were (a) that the zamindari system shall be abolished, (b) that just and equitable compensation shall be paid to those from whom these zamindari rights are acquired, (c) with regard to any other property that is acquired just and fair compensation shall be paid.[44] There was

37 For instance, (Member S. Nagappa stated) legislations pushed by the Madras Government under the leadership of T. Prakasam. Supra n. 31.

38 Sardar Vallabhbhai Patel and S. Nagappa, Supra n. 31; Mahboob Ali Baig, Supra n. 33.

39 Mahboob Ali Baig, Supra n. 33.

40 This Article was numbered as 24 in the Draft Constitution of India, Supra n. 33.

41 Justice K. Subba Rao (Retired Chief Justice of India) Property Rights Under the Constitution (1969) 2 SCC (Jour) 1.

42 Jaspat Roy Kapoor, Supra n. 31.

43 Prabhu Dayal Himatsingka and B. P. Jhunjhunwala, Supra n. 31.

44 Jaspat Roy Kapoor, these decisions and principles were being used in election manifesto, in the decision arrived at Constituent Assembly, in the Honourable Prime Minister's

a widespread belief that in modern democracies, the executive controlled the majority of the Parliament, and it could push through any law it liked and that in India for a long time to come there would not be enlightened public opinion. Therefore, there was a need to provide for judicial check on both executive and legislative action. The State was given enough power of eminent domain in public interest through the rule of law without jeopardising the individual right to property.[45]

Claim of Legitimate Expectation of Fundamental Right to Property in Land

With regard to the enquiry as to whether original Constitution of India had given rise to a Legitimate Expectation of fundamental right to property, debates in the Indian Constituent Assembly, decisions of the Supreme Court of India and views of the distinguished jurists have been a great help in identifying and evaluating the factors giving rise to the Legitimate Expectation of the people of India to fundamental right to property.

By and large, during the course of adinistrative or executive actions, expectations that also often lead to reliance may be generated in the following circumstances: explicit promises, public announcements regarding a legal position or policy, established official practices and the authorities accepted practices. Furthermore, the ongoing practice is actually a public advertisement of official policy, with its ongoing character substituting for its informality.[46] There is a difference between a mere hope, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision[47]. As the

statement and the Government's Statement on Industrial Policy (Industrial Policy on the 6th April 1948), Supra n. 31.

45 Supra n. 41.

46 Supra n. 21.

47 Gratzinger and Gratzingerova v. the Czech Republic (dec.) [GC], no. 39794/98, ECHR 2002-VII, as cited in Aida Grgiæ, Zvonimir Mataga et al, The right to property under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights and its protocols, Human rights handbooks, No. 10, 1st edition, June 2007.

Supreme Court of India [48] explained, the doctrine of legitimate expectation has both substantive and procedural aspects. A policy decision that makes a representation that benefit of substantive nature will be granted creates legitimate expectation, which is substantive in nature and is normally binding on the decision maker.

During the elaborate debate on Article 31(2), which was proposed by the Mover Sardar Vallabhbhai Patel in the Constituent Assembly, it was asserted by the member S. Nagappa that the Article 31(2) gave some hope to the poor tiller of the soil. This Article gave a promise to the people of the country that whenever there is an acquisition of land by the Union Government or the Unit Governments from either individual or corporations or from industrialists in the public interest there shall be paid compensation to them. However, it was argued that in the case of Government acquiring lands from a zamindar, they need not pay the actual market or local rate in the form of reasonable compensation. There has been emphasis on conferring ownership of land on the tiller of the soil as it gives encouragement to the toilers and makes them increase the produce and the national wealth. There was a hope that this Article will not stand in the way of the provinces pushing forward land legislation, which they have in some cases already undertaken. This makes clear that the Article was incorporated for conferring ownership of land on the tiller of the soil and to safeguard their interests in the lands and the Article was not intended to be a obstacle in the way of agricultural and land reforms. This was evident when S. Nagappa further said "*Once the zamindaris are abolished and the Government acquire their properties, it must be their endeavour to make the best use of such properties. The Government must see to it that collective farms are formed and that, through them, the maximum is produced and the tiller is given sufficient for what he does. These are the hopes which the particular clause gives to the poor tillers of the soil*". [49]

48 M.P. Oil Extraction v. State of M.P (1997) 7 SCC 592.

49 Discussion on Clause 19 of the Fundamental Rights. Supra n. 31.

The Clause (1) of the Article 31 provided that no person shall be deprived of his property save by authority of law. However, it was contended that the succeeding clause (2), in effect, deprived the citizen of the fundamental right to property, which was sought to be secured by clause (1), because it gave to the Legislature power to determine the entire value of the right, which was secured to him by clause (1). Furthermore, on account of clause (2) there was bound to be uncertainty about the value of property and a sense of insecurity in the land. The crucial question was that what effect of such a sense of insecurity and uncertainty of the value of property would be in the economy of this country. There would be no incentive for people to invest money in lands. This was a matter affecting the economy of the land and there was a suspicion that whether this Article would ensure the confidence in the minds of people, which was needed most for the success of any commercial undertaking or for the success of any agricultural undertaking. [50] This goes to evince that the people in India had placed reliance on the guarantee of the property and compensation as secured under Articles 31 and 19(1) (f). The people had every reason to believe that their dependence and reliance on the land and investments they made on the land relying on the vowed assurance under the said Articles would not to be impeded by the change of policy of Government.

In this context, it is appropriate to mention that protection of expectations has been regarded as a means of protecting reliance[51] and that the protection of reliance guarantees the continued flow of commercial life.[52] Reliance is considered as a relevant factor although detrimental reliance should not be a condition precedent to the protection of a substantive legitimate expectation.[53] Moral and non-utilitarian approaches such as Kantian view also support protection of reliance. Kantian view holds that each person's humanity could be respected by way of protecting reliance. Making good to the damages inflicted

50 K. T. M. Ahmed Ibrahim. Supra n. 31.

51 L. L. Fuller & E. R. Perdue The Reliance Interest in Contract Damages 46 Yale L.J. 52 and 373 (1936-37) at p. 60.588, as cited in Supra n. 21.

52 Id, p. 61, as cited in Supra n. 21.

53 De Smith, Woolf et al, Judicial Review of Administrative Action 5th ed., by Lord Woolf and J. Jowell, 1995 p. 574, as cited in Supra n. 21.

on relying parties shows consideration for their needs as creatures endowed with dignity.[54] It further argues that protecting expectations (even without detrimental reliance) is based on the value of social commitment.

As in the case of basic structure, which was evolved by the Supreme Court, there are similar silences in Indian constitution, which as profound as are its written provisions.[55] The claim of legitimate expectation of fundamental right to property need not be expressly mentioned in Indian constitution. The fact that a complete list of these essential elements constituting the basic structure is not enumerated is not a ground for denying that these exist.[56] It was observed that even after the Article 31 (2) was amended by the Twenty Fifth Amendment to the Indian Constitution in 1971,[57] this Article was still a fundamental right[58] and it still binds the Legislature to give to the owner a sum of money and it does not empower the State to confiscate property. The Indian Constituent Assembly could have abrogated this right but has not done so and it has not said that State shall not pay anything for the acquisition of property, although it could have said so.[59] Though Justice Khanna (with respect) in Keshavananda Bharathi Case held that fundamental right to property was not a basic structure of the constitution, a summary signed by nine Judges, including Justice Khanna himself, (excluding Ray, Mathew, Dwivedi and Beg, JJ.), which purports to state the view of the majority in this landmark case,[60] does not consist the abovementioned point of view held by Justice Khanna

54 Immanuel Kant, Groundwork of the Metaphysics of Morals (trans. and ed. by Mary Gregor, 1997), as cited in Supra n. 21.

55 Fali S. Nariman, The Silences in Our Constitutional Law (2006) 2 SCC (Jour) 15.

56 Justice Jaganmohan Reddy, in Keshavananda Bharathi case, (1973) 4 SCC 225 pp. 637-638 (para 1159).

57 Substituted the word "compensation" by "amount" and which provided in Article 31(2) inter alia that a law is not to be questioned on the ground that the amount is not adequate.

58 Justice Chandrachud ,in Keshavananda bharathi case, 1973) 4 SCC 225 p 889, para 1751.

59 Ibid, p. 1000, para 2121.

60 Prof. Upendra Baxi, The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment, (1974) 1 SCC (Jour) 45.

relating to fundamental right to property.[61] In this celebrated Keshvananda Bharathi Case[62] an eminent Judge Justice Mathew, while bringing out the real intention of the makers of the Indian constitution as to the critical role of the fundamental right to property in the lives of the people, said "The framers of our Constitution made the right to acquire, hold and dispose of property a fundamental right thinking that every citizen in this country would have an opportunity to come by a modicum of that right."

There were apprehensions as early as in 1973 [63] that the fundamental right to property may be removed altogether by way of deleting the Articles 31 and 19(1) f. Therefore, there was a demand that the Government must appoint a high power committee of eminent lawyers to evolve principles for evolving reasonable amount for the land acquired. It was opined that so long democracy continues to exist in our country and so long the State has not become the owner of all property, definiteness and certainty in law of property is essential for the stability of the State. There is another reason why the people of India had the Legitimate Expectation of fundamental right to property. The people under the original Constitution had a belief that their fundamental right to property would not be taken away for giving effect to the agrarian reforms because people believed that these reforms could be introduced within the framework of the original Constitution, which conferred upon them the fundamental right to property. As rightly pointed out by Justice K. Subba Rao that all the agrarian reforms could have been introduced within the framework of the original Constitution. This could have been done by a process of harmonisation and not by creating a conflict between the Fundamental Rights and Directive Principles of State Policy, because the permissible limit for reconciliation are wide enough to implement the directive principles without unreasonably abridging or taking away the fundamental rights. It has been strongly believed that both Fundamental Rights and Directive Principles of State Policy together

61 For summary see H.M Seervai, Constitutional Law of India, p. 3113 (2006).

62 (1973) 4 SCC 225 p. 885, para 1731.

63 Justice K. Subba Rao (Ex-Chief Justice of India), The Two Judgments: Golaknath and Kesavananda Bharati, (1973) 2 SCC (Jour) 1.

constitute the ideals of a democratic welfare state and indeed its conscience.[64] Prof. Upendra Baxi makes this point clear when he writes "*Each and every fundamental right is an embodiment of the values summed up by the label 'social justice'. The truth is that all the Fundamental Rights together with the majority of the Directive Principles elucidate the constitutional conception of social justice for India and this conception, like all conceptions of social justice, embodies values which cannot be fulfilled concurrently in an economy of scarcity.*" [65]

As to whether the idea of fundamental right to property had been derived from any other constitutions and as to impact of those constitutions on the insertion of fundamental right to property in the Original Constitution of India, it is a well-known fact that our constitution makers attached great importance to the constitutions of other democratic countries. For instance, the Advisory Committee[66] had in its view the American Constitution in framing the fundamental rights. The Fifth Amendment, 1791 to the American Constitution runs thus: "*…nor shall private property be taken for public use, without just compensation".*

In paragraph 3 of the Report of the Advisory Committee it is stated:

"We attach great importance to the constitution making these rights justiciable. The right of the citizen to the protection in certain matters is a special feature of the American Constitution and the more recent democratic constitutions."[67]

This makes it clear that the American Constitution had played a role in the making of Indian constitution particularly in the area of Right to Property. The American Constitution stresses the word "just" in qualifying the word "compensation" in the Fifth Amendment, 1791. The Third Series

64 Supra n. 63.

65 Prof. Upendra Baxi, The Constitutional Quicksands of Kesavananda Bharati and the Twenty-FifthAmendment, (1974) 1 SCC (Jour) 45.

66 It prepared the Interim Report on Fundamental Rights, Supra n. 31.

67 Raja Jagannath Bakhsh Singh, Supra n. 31.

of Constitutional Precedents[68] referred to the Constitution of Danzig and commented that;

"The right, may only be effected in accordance with the provisions of the law and for the benefit of the whole, community, and in return for due compensation, in case of dispute with regard to the amount of compensation recourse may be had to the law-courts."

Further, the constitutions of Australia and Germany were quoted and referred to in the debates of Indian Constituent Assembly.[69] Section 51 (xxxi) of the Constitution of the Commonwealth of Australia runs as follows: "The acquisition of property on just terms from any State or person in respect of which the Parliament has power to make laws." Article 23 of the German Constitution declares "… expropriations may be imposed only for the benefit of the general public and on a legal basis. They shall take place against reasonable compensation …. If the amount of compensation is in dispute, recourse to the ordinary courts shall be open…"[70] It was also brought to the notice of Constituent Assembly that the Constitutions of Belgium, Bulgaria, Denmark, Finland, Albania, and Yugoslavia consist the word "just" that qualifies "compensation".

It was opined that in all political economies there has been confusion between two different kinds of private property, one of which is based upon the producer's own labour, while the other is based upon the exploitation of the labour of others. Even the Russian Constitution,[71] therefore, rejects private ownership of the instruments of production but admits only to a limited extent

68 Constituent Assembly of India, Constitutional precedents (Third Series) (1947), Supra n. 31.

69 Raja Jagannath Bakhsh Singh, Supra n. 31.

70 Rai Bahadur Syamanandan Sahaya brought this out by quoting the constitutional series on Fundamental Rights which was circulated to the members of the Assembly by Sir B. N. Rau. Supra n. 31.

71 Articles 13 and 57 of the Constitution (Fundamental Law) of The Union of Soviet Socialist Republics, available at http://www.constitution.org/cons/ussr77.

of private ownership based upon the producer's own labour.[72] It is pertinent to note that private property had been recognized under article 19 (1) (f) [73] and also by implication under Article 31(1).[74] As rightly asserted by Mahboob Ali Baig,[75] the sub-clause (5) to Article 19, which modified the fundamental right, provided that state can impose only restrictions on the exercise of any of these rights. Therefore, Indian Constitution does not propose to abolish private property, as the U.S.S.R. has done in its Constitution. Indian society is still based on what is technically called capitalistic system of economy, meaning thereby that property is held by individuals and not by the entire people. Indian system is similar to the system prevailing in the U.K. and U.S.A. and in the Constitution of the U.S.A., it is clearly laid down that the State cannot deprive a man of his life, liberty or property without due process of law. So is the case in the U.K. A member in the Indian Constituent Assembly rightly opined that nowhere the world the compensation was awarded for any kind of property at the pleasure of the Legislature. The framers of the Art.31 (2) in the original constitution had been obsessed with the then question of the abolition of he Zamindari system.[76]

Expectation on Right to Property in a Comparative Perspective

At the international level, the right to property was first recognized in Article 17 of the Universal Declaration of Human Rights, 1948 which runs as follows: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property." In this connection, it can be mentioned that the Universal Declaration of Human Rights was adopted by the United Nations General Assembly when debates in the Indian Constituent Assembly for the drafting of the constitution

72 Supra n. 41.

73 This Article was numbered as Article 13 in the Draft Constitution, Supra n. 33.

74 M.A. Baig, Supra n. 33.

75 Supra n. 33.

76 K. T. M. Ahmed Ibrahim, Supra n. 33.

were going on. Therefore, it must be reasonably assumed, as the Supreme Court has said in the case of *Maneka Gandhi* v. *Union of India*[77], that the makers of the Indian Constitution in framing Part III on the Fundamental Rights were influenced by the Universal Declaration of Human Rights.

The issue relating to whether Constitutions of other countries have given rise to a Legitimate Expectation of fundamental right to property in their respective states needs to be looked into in the background of the above-mentioned fact that the Indian constitution makers attached great importance to the US Constitution. Being so, the focus of this discourse is towards the US Constitution and the Fifth Amendment thereto. The concept of property developed by the European Court of Human Rights has been found similar to that in the Fifth Amendment of the US Constitution.[78] The law on property in USA is based on common law and that the Taking Clause takes its inspiration and meaning from the common law of property. As to the use of property the presumption of the common law is on the side of free use. At common law, people are not required to obtain a permit before they can use their property in the same manner as people today are not required to obtain a permit before they can speak freely. Protection of property rights in America are not simply a matter of the Fifth Amendment, that is, of positive law. It is also said that for more than two years between the time the Constitution was ratified and effect and the time the Bill of Rights was ratified, property rights were protected not only against private but against public invasion as well. This protection stemmed, therefore, not from any explicit constitutional guarantee but from the common law. Being so, the Takings Clause was meant simply to make explicit, against the new federal government, the guarantees that were already recognized under the common law.[79] The federal power of eminent domain is

77 1978 AIR 597, 1978 SCR (2) 621.

78 Von Banning, Theo, R.G., The Human Right to Property,2002,Antwerp, Intersentia, as cited in H.D. Ploeger, Daniëlle A. Groetelaers et al, Planning and the Fundamental Right to Property. OTB Research Institute for Housing, Urban and Mobility Studies Delft University of Technology, available at http://aesop2005.scix.net/data/papers/att/394.fullTextPrint.pdf (Accessed March 24, 2014).

79 Roger Pilon, Cato Handbook For Policymakers Property Rights and the Constitution, CATO Institute, 7th Edition (2009).

limited by the grants of power in the Constitution, so that property may only be taken for the effectuation of a granted power not otherwise. [80] It is firmly asserted by the courts of USA that the power of eminent domain is merely the means to the end.[81]

In USA unlike the police power, the eminent domain power is not inherently legitimate. It is contended that in a state of nature prior to the creation of government, none of us would have a right to condemn a neighbor's property, however worthy our purpose, however much we compensated him. Hence, the eminent domain was known in the 17th and 18th centuries as the despotic power. It exists from practical considerations alone, that is, to enable public projects to go forward without any hindrance being posed by the people who seek to exploit the situation by extracting far more than just compensation. It is also believed that if the laws that provide the public with benefits continue to grow without providing for the payment of compensation to those from whom they take property, the state will end up in paying a heavy price for the uncertainty and inefficiency it creates.[82] The importance of and sanctity attached to right to property in USA may be better understood if one appreciate the upshot of the case of Kelo v. City of New London decided in 2005, which resulted in public outcry across the nation and the introduction of reforms in over 40 states. Following the Court decision on the Kelo's case, there was extensive outrage across the USA and a multitude of states introduced laws restricting the use of eminent domain. Michigan passed a restriction on the use of eminent domain in November 2006; Florida passed a 2006 ballot measure amending the Florida Constitution to restrict use of eminent domain, and also in New Hampshire.[83]

An important objective behind the guarantee as secured under the Fifth Amendment to the US Constitution that the private property shall not be

80 United States v. Gettysburg Electric Ry., 160 U.S. 668, 679 (1896).

81 Berman v. Parker, 348 U.S. 26, 32, 33 (1954).

82 Supra n. 78.

83 Nirmal Mohanty, Eminent Domain Powers Rationale, Abuse, and Way Forward, India Infrastructure Report-Land— A Critical Resource For Infrastructure, 44, 47 (Infrastructure Development Finance Co., ed., 2009). available at http://www.idfc.com/pdf/report/IIR-2009.pdf (Accessed March 24, 2014).

taken for a public use without just compensation was to prohibit Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole.[84] Takings Clause, which requires that any provision of public goods that entails taking private property, must be accompanied by just compensation for the owner of the property. Otherwise, the costs of the benefit to the public would fall entirely on the owner.[85]

It is worth noticing the case decided by the Supreme Court of the United States[86], which upheld the claim of legitimate expectation of the people to right to property under the Fifth Amendment. The court said "… Exercises of the taxing power are one obvious example. A second are the decisions in which this Court has dismissed taking challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute property for Fifth Amendment purposes." It is interesting to note that the dissenting opinion expressed in this case by the three Judges[87] also supported unequivocally the claim of legitimate expectation of the people to right to property. The dissenting Judges opined "The Fifth Amendment must be applied with reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

84 Armstrong v. United States, 364 U.S. 40, 49 (1960) and it was held in this case that the political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice, as cited in Fifth Amendment, Rights Of Persons, Authenticated US Government Information, GPO. available at http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-6.pdf (Accessed March 24, 2014).

85 Supra n. 78.

86 Penn Central Transportation Co.et al. v. New York City et al. Decided in June 26, 1978, consisting the Judges: Brennan, J., delivered the opinion of the Court, in which Stewart, White, Marshall, Blackmun, and Powell, JJ., joined. Rehnquist, J., filed a dissenting opinion, in which Burger, C. J., and Stevens, J., joined.438 U.S. 104; 98 S. Ct. 2646.

87 Ibid, Rehnquist, J., filed a dissenting opinion, in which Burger, C. J., and Stevens, J., joined.

Conclusion

Property in land has been not only the source of livelihood of the people of India but also the symbol of their identity in the society and the community they live in and this identity has been transferred uninterruptedly from one generation to another. The property has been relied and considered as the security of life not only by the holders of that property but also by the holders' next generation, which creates a sense of certainty in their lives. As Rosco Pound rightly supports, the expectations of the people are not due to the legal recognition thereof but they are generated out of the people's indispensible dependence and reliance on the property for various reasons from time immemorial. The security of property is ensured, and the legitimate expectations of the people to the basic right to property are honoured and recognised by the confirming conduct of the people and culture of society, which assure the holders of the property that their holdings are well recognised and secured in their hands. What the state has done through its legal instruments like Constitution is merely recognizing, acknowledging and upholding this conduct and culture of the society thereby honouring the expectations of the people as well as the value the people and society attached to the property.

The people of India under British Rule had been already exposed to the western notion of social and political values, namely justice, equality, liberty, equity, rule of law and constitutionalism. The people were also aware of the fact that western countries, in particular, United Kingdom and Untied States of America had given their citizens an enforceable right to property and compensation and these States would not interfere with this right arbitrarily. It would not be an exaggeration to opine that a genesis of the legitimate expectation of people of India to fundamental right to property could be traced back to the Section 299 of the Government of India Act, 1935, which had also assured the people the security of property and compensation, thereby, in a way, generating the expectations among the people that the state would not interfere arbitrarily with this basic human right to property and compensation.

These expectations of the people of India were further positioned and established firmly on the principles of justice, equality, liberty and fraternity when the Indian people received such an assurance from their own adorned leaders who became the founding fathers of not only the independent India but also of the Constitution of India. It is evident from the views of the esteemed and learned members of the Indian Constituent Assembly who were well aware of the critical role of the property in the lives of people. The founding fathers of the Indian Constitution, therefore, assured the people of India uninterrupted enjoyment of fundamental right to property and they further promised the masses of India that their property would not be expropriated unless due compensation is paid. They also made it clear to the people that agriculture and land reforms would not come in the way of their fundamental right to property and compensation. They were aware and had also acknowledged the essential need for balancing and harmonising the Fundamental Rights and Directive Principles of State Policy without abrogating the substance of either of them. They knew that these reforms could be achieved within the framework of the original Constitution and, if need requires, with necessary unsubstantial changes in the Constitution and without abrogating the present fundamental right to property.

Furthermore, people were allowed under the Constitution to enjoy the fundamental right to property and fundamental right to receive compensation for more than two decades till these rights under Articles 31 and 19(1)(f) were completely deleted from part III of the Indian Constitution in 1978. The above assurance to the people and the past conduct and practice of the Government allowing the masses to enjoy the property have, by all means, instilled a firm belief that the Government would not deprive the people of this fundamental and basic human right to property and compensation. In view of the entire analysis made hitherto on all the aspects of the subject of this paper, the people of India had every valid reason to rightfully and legitimately expect from the Government that the latter would stick to its sworn promise and would be bound by its duty of honouring the legitimate expectation of the people of India to fundamental right to property and compensation.

After meticulous perusal of the debates in the Indian Constituent Assembly on the provisions relating to fundamental right to property what may be derived is that the founding fathers of the Indian Constitution had strongly and sensibly committed to confer the fundamental right to property on the people of India and they conferred it. Furthermore, the makers of the Constitution knew that, as suggested by Justice K. Subba Rao, all the agrarian and land reforms could have been introduced within the framework of the original Constitution by a process of harmonisation and not by creating a conflict between the Fundamental Rights and Directive Principles of State Policy. In the event, the makers of the constitution had an iota of suspicion that in future this right would be abrogated for practical reasons, for example, to give effect to land reforms, or if they had considered it is impractical or not feasible to confer this right on the people due to prevalent and practical difficulties, for example, some suggested that the State is not financially capable to bear the compensation, the founding authors of the Indian Constitution would not have inserted this right in the Part III[88] of the Constitution; instead they would have placed the provisions relating to right to property in the Part IV[89] of the Constitution like they resolved to do in the case of right to education, work and living wage. But makers of the Indian Constitution did not place it in Part IV precisely because they never intended to liquidate this right in future nor had they foreseen the necessity for the future Parliament to abrogate this right. This is evident from the very fact that it 28 years for the Parliament to delete the fundamental right to property in the absence of the founding fathers who avowedly committed to confer and who did confer the fundamental right to property on the people of India.

88 All the Fundamental Rights are listed in this Part of the Indian Constitution.

89 Provisions under Part IV of the Indian Constitution are not enforceable.

Law Relating to Rape: An International Humanitarian Perspective

Miranda Das[*]

Introduction

Throughout history irrespective of the geographical location, rape and other acts of sexual violence against women have always been one of the primary constituents of war. Sexual violence against women is used as a weapon in the time of war for violating women as well as humiliating men of the defeated side, thereby eroding the social and moral fabric of the entire community across generations.[1] Despite witnesses and survivors, who come forward to testify, and documents which are collected, it remains, according to Todd Salzman (2000), not only one of the most underreported crimes worldwide, but it is also one of the least punished in the aftermath of a war. Occurrences of rape are frequently considered an inevitable by-product of war with the non sequitur 'Boys will be boys'.[2]

Bastow[3] identifies three different forms of sexual violence. The first is called individual rape: on March 2006, five United States soldiers gang raped a fifteen year old girl named Abeer Qasim Hamza al-Jan-abi. Not only was she raped but her skull was smashed and her body was also set on fire. In the second type comes what is called military sexual slavery. For example, in the World

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1 E. Trabucchi (2008), "Rape Warfare and International Humanitarian Law", Human Architecture: Journal of the Sociology of Self-Knowledge, Vol. 4, Issue 4, p. 41.

2 T. Salzman, (2000). "Rape Camps' Forced Impregnation, and Ethnic Cleansing: Religious, Cultutal, and Ethical Responses to Rape Victims in the Former Yugoslavia", in A. L. Barstow (ed.), War's dirty secret: Rape, Prostitution, and Other Crimes against Women, Cleveland, OH: Pilgrim Press, p. 87.

3 A. L. Barstow (ed.). (2000). War's dirty secret: Rape, prostitution, and other crimes against women. Cleveland, OH: Pilgrim Press.

War II, an estimated 200,000 women were forced to act as 'comfort women' whose occupation became providing sexual pleasure to the Japanese soldiers. The final form is called mass rape. It is specifically planned as in the case of Bosnia-Herzegovina and Rwanda's genocide.

History of International Jurisprudence and Criminalisation of Sexual Violence

Prohibitions against sexual violence have been codified as part of international humanitarian law since, at least, the late 1800s, and some of the warrior codes which prohibit sexual violence go as far back as the first century.[4] Early prohibitions existed primarily to protect women by virtue of their status as the property of men, and later on protections mostly construed sexually violent crimes as violations of honour. Rape has long been prohibited during times of warfare despite its somewhat recent emergence as an international crime following the World War II.[5] For example, in the United States, the Lieber Code of 1863[6] (passed during the Civil War) purported to codify the customary international rules of land warfare.[7]Amongst the behaviours prohibited by the Lieber Code were acts of wanton and unnecessary violence, which were deemed illegal and prohibited at every rank in the Union Army.[8] Both rape and sexual violence were understood to be "wanton violence" and thus not permitted.[9]

4 Patricia Viseur Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation", p. 7, Available at: http://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf.

5 Mark S. Ellis (2006-07), "Breaking the Silence: Rape as an International Crime," Case Western Reserve Journal of International Law, Vol. 38, Issue. 2, p. 227.

6 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Available at: file:///C:/Users/Dr.%20Singh/Desktop/IHL-L-Code-EN.pdf.

7 "Customary international law" is one of two sources of international law (international treaties being the other). Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. Customary law is binding on all states.

8 Lieber Code, Article. 44.

9 Ibid.

In 1907, the Lieber Code was adopted as international law at the International Peace Conference in Copenhagen, and it became the basis for Hague Convention IV for respecting the laws and customs of war on land.[10] Article 46 of the 1907 Convention indirectly enjoined rape, speaking of the protection of "family honour," which was widely understood to encompass sexual violence. Ultimately, however, despite the advances they made towards prohibiting the rape of women, both the Lieber Code and the Hague Conventions' prohibitions against sexual violence were based on the notion that women deserved protection because they were the property of men. It was not until the introduction of the Nuremberg Trials in 1949 that courts began to seriously consider rape and sexual violence as crimes against women themselves.

The Nuremberg Tribunal

The Nuremberg Charter, which established the rules and procedures governing the International Military Tribunal through which prominent members of the Nazi party were put on trial following World War II, does not specifically mention rape among its enumerated list of prohibited acts, nor did any prosecutions for rape per se take place during the Nuremberg Trials. The Control Council Law No. 10, which was adopted by the occupying powers in Germany and served as the basis for later prosecutions of German military and civilian personnel at Nuremberg and elsewhere, listed rape for the first time as a crime against humanity in an attempt to provide a uniform basis for prosecuting war criminals.

International Military Tribunal for the Far East

The International Military Tribunal for the Far East (IMTFE), which was created through special proclamation by Gen. Douglas MacArthur to try leaders of the Empire of Japan following the World War II, similarly contained no reference to rape or sexual violence in its charter.[11] However, the IMTFE did

10 International Committee of the Red Cross, "International Humanitarian Law – Treaties & Documents." Available at http://www.icrc.org.

11 Charter of the International Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589.

explicitly charge defendants with rape and sexual violence. For instance, General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota were all found guilty of crimes, including rape, through a theory of vertical liability whereby a commander may be held liable for war crimes perpetrated by his troops if he knew the crimes were occurring and had the power to stop them, but failed to prevent those atrocities or punish offenders.[12] These convictions should be contrasted, however, with the failure to pursue accountability on behalf of over two hundred thousand women who were forcibly placed in rape camps by the Japanese government.[13]

1949 Geneva Convention Relative to the Treatment of Prisoners of War and the 1977 Additional Protocols

Article 27 of the Fourth Geneva Convention of 1949 was the first multilateral international agreement to both explicitly mention and prohibit rape. The article states: "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." The article makes rape, enforced prostitution and other forms of indecent assault illegal, but the Convention falls short of including rape as among the grave breaches[14] listed in the Article 147.

On June 8, 1977, the Geneva Conventions' Additional Protocols I and II entered into force to address changes in methods of warfare that had developed since the World War II. Of these protocols, the Protocol I addresses crimes that arise during international conflicts, and the Protocol II addresses non-international armed conflicts. Both additional Protocols expressly prohibit rape and forced prostitution. Article 75 (2) (b) of Additional Protocol I prohibits: "Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault." The provision does

12 Mark S. Ellis, "Breaking the Silence: Rape as an International Crime," Case Western Reserve Journal of International Law 38 (2006-07): 228.

13 Such women were called 'Comfort Women', who were to provide Japanese soldiers with sexual pleasure.

14 "Grave breaches" are the most serious international crimes, which states are obligated to both prohibit and prosecute.

not expressly mention rape. However, Article 4 (e) of Additional Protocol II prohibits rape. The article prohibits: "Outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". Article 76 (1) of Protocol I states: "[w]omen shall be the object of special respect and shall be protected in particular against rape, enforced prostitution, and any other form of indecent assault." While the Conventions include rape and enforced prostitution, they equate these crimes with crimes of honour and dignity rather than with crimes of violence. Thus, they conceal the nature of the crime and perpetuate detrimental stereotypes.

Codification of the Crime of Rape Under International Criminal Law

In the past two decades, the international criminal tribunal for the former Yugoslavia and Rwanda have developed a rich jurisprudence on sexual violence crimes, and the younger international courts, that is, the International Criminal Court and the Special Court for Sierra Leone in particular, are beginning to follow suit. Prior to the creation of these tribunals, international law had failed to clearly articulate the elements necessary for the effective prosecution of rape and sexual violence. Thus, the tribunals had to establish their own definitions, which they did during a series of key cases.

International Criminal Tribunal for Rwanda (ICTR) Jurisprudence

The first case to identify the elements of rape in an international setting was Prosecutor v. Akayesu, which was prosecuted before the International Criminal Tribunal for Rwanda (ICTR) in 1998.[15] In Akayesu, the accused was convicted of rape as a crime against humanity besides genocide with rape as a predicate crime. Although the trial chamber in Akayesu recognized that there was no commonly accepted definition of the crime of rape in international law, it did not explore in depth how the crime is defined in various legal systems.

15 Case No. ICTR-96-4-T, Trial Judgment, 685–696 (Sept. 2, 1998), http://www. unictr. org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

Rather, the trial chamber defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." By adopting the phrase "a physical invasion of a sexual nature," the trial chamber rejected the traditional definition of rape. The act of rape, the trial chamber declared, could involve dignitary harms that did not involve penetration or even physical contact. For example, a student being forced to publicly undress and do gymnastics in the nude was found to constitute sexual violence. The reason behind such judgement was the inability to capture the crime of rape through the mechanical narrative of objects or parts of bodies of the one who is raped and the rapist.[16] Thus, the trial chamber provided broad latitude for the nature of the sexual acts included within the crime of rape. The point to be noted is that the Akayesu definition is gender neutral, which implies that a male could also be a victim of rape and a female could be a perpetrator. This diverges from the traditional common law understanding of rape as a crime that a male commits upon a female.

The ICTR's decision in Akayesu had two other notable features. First, whether a victim needed to establish that he or she had been coerced into sexual behaviour, which could be difficult to prove and thus a major barrier to prosecution. Second, whether the accused could raise a defence that the victim had consented to the sexually-violent conduct. In addressing coercion, the trial chamber did not limit coercion only within a show of physical force, and other forms of duress such as threats, intimidation, and extortion were also determined to constitute coercion, and it was also found to be inherent in armed conflict.[17] It further clarified that in the presence of coercion, the need to prove a lack of consent was obviated.

In 2005, in *Prosecutor v. Muhimana*, an ICTR trial panel again considered the proper definition of the crime of rape.[18] In that case, the accused was charged

16 K. A. Koenig, et. al (2011), "The Jurisprudence of Sexual Violence", A Working Paper of the Sexual Violence and Accountability Project, Human Rights Center, University of California, Berkeley, p. 10.

17 Ibid.

18 Case No. ICTR-95-1B-T, Trial Judgment and Sentence, ¶ 536 (Apr. 28, 2005), http://

with rape as a crime against humanity. At trial, both the prosecution and the accused endorsed the definition of rape as adopted in *Akayesu*. The trial chamber in *Muhimana* concluded that the two working definitions of rape (in *Akayesu* and *Kunarac*) are not incompatible. The chamber further noted that, although the *Kunarac* definition had been viewed as a departure from the definition of rape adopted in *Akayesu*, the two definitions are actually "substantially aligned".

The Trial Chamber Explained The Matter As Follows:

The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a "physical invasion of a sexual nature", *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.[19]

Based on this reasoning, the ICTR trial chamber endorsed "the conceptual definition of rape established in Akayesu, which encompasses the elements set out in Kunarac." Utilizing this definition, the trial chamber determined that the accused was criminally liable. The trial chamber, however, did not explain how it reconciled the differing definitions of the crime of rape in Akayesu and Kunarac. Additionally, it did not explain how it applied the resulting definition to the facts of the case before it. Consequently, the trial chamber in Muhimana left more questions about the elements of rape under international law open and undecided.

In 2006, in *Gacumbitsi v. Prosecutor*, the ICTR appeals chamber finally determined the proper definition of rape.[20] In *Gacumbitsi*, the accused was convicted of rape as a crime against humanity. Arguing on appeal that the judgment should be affirmed, the prosecutor submitted that lack of consent and the accused's knowledge thereof are not elements of the crime of rape.

www.unictr.org/Portals/0/Case/English/Muhimana/decisions/muhimana280505.pdf

19 P. Weiner (2013), "The Evolving Jurisprudence of the Crime of Rape in International criminal Law", Boston College Law Review, Vol. 54, Issue. 3, p. 1215.

20 Case No. ICTR-2001-64-A, Appeal Judgment, ¶ 152 (July 7, 2006), http://www.unictr.org/Portals/0/ Case/English/Gachumbitsi/judgement/judgement_appeals_070706.pdf.

Instead, the prosecutor argued that rape should be viewed in the same manner "as torture or enslavement, for which the prosecution is not required to establish absence of consent." The appeals chamber adopting the *Kunarac* definition of rape, explained that *Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity.

Gacumbitsi finally reconciled the two divergent definitions of rape as used in the International Criminal Tribunal for the former Yugoslavia (ICTY) and ICTR. This result is not surprising because the ICTY and ICTR share the same appeals chamber. In fact, four of the five appellate judges who sat on the Gacumbitsi appeal also participated in the Kunarac appeal.[21] The Gacumbitsi appeal judgement established that a more traditional definition of rape, as opposed to the more expansive definition in Akayesu, applies in both the ICTY and ICTR.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) Jurisprudence

Four months after the ICTR trial chamber's decision in Akayesu, in December 1998, a trial panel of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Prosecutor v. Furundžija charged the crime of rape as a violation of Common Article III of the Geneva Conventions.[22] After having been recognized the absence of a generally accepted definition of rape in international law, the ICTY drew "upon the general concepts and legal institutions common to all the major legal systems of the world" in order to arrive at an "accurate definition of rape." Whereas the chamber initially referred to the Akayesu definition, but it later on it was ignored while constructing its own definition.

21 Each case involved an appellate panel consisting of five judges, with the same four judges sitting on both cases: Judge Mehmet Guney, Judge Theodor Meron, Judge Mohamed Shahabuddeen, and Judge Wolfgang Schomburg. See Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Judgment; Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-A, Appeal Judgment.

22 Case No. IT-95-17/1-T, Trial Judgment, 43, 274 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

The ICTY trial panel's decision in Furundžija identified the following elements of the crime of rape:

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.[23]

This definition followed more closely the traditional common law understanding of rape than did the ICTR's definition of rape in Akayesu.[24] For example, the Furundžija definition required that the perpetrator had to be male unless a female had used an object or had served as an accessory to the act of rape. Additionally, under the Furundžija definition, certain forms of sexual activity such as forced digital penetration did not constitute rape. Furthermore, under the Furundžija definition, force or coercion was clearly an element of the crime.

Moreover, the Furundžija trial judgment went beyond the traditional common law definition of rape as it included "threats of force against . . . a third person" in order to acknowledge the situation whereby a woman is compelled to agree in establishing sexual relations with the rapist only in response to a threat made against her child or another family member.

In 2001, just over two years after Furundžija, the ICTY decided on the Prosecutor v. Kunarac, Kovac & Vokovic, which is the court's seminal case relating to the crime of rape.[25] In Kunarac, the accused were charged with

23 K. A. Koenig, et. al (2011), "The Jurisprudence of Sexual Violence", A Working Paper of the Sexual Violence and Accountability Project, Human Rights Center, University of California, Berkeley, p. 11.

24 The traditional [definition] did not include attacks on male victims, acts other than sexual intercourse, sexual assaults with an object, or sexual assaults by a spouse

25 Case Nos. IT-96-23-T & IT-96–23/1-T, Trial Judgment, ¶ 436 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 22, 2001), http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.

the crime of rape as a violation of the Common Article III and as a crime against humanity. The Kunarac trial judgment addressed all three principal inconsistencies in the definitions of the crime of rape under international law

As in *Furundžija*, the trial panel in *Kunarac* initially noted that there was no definition of the crime of rape in international humanitarian law or in the tribunal's statute. Thus, in order to arrive at a proper definition, the trial panel conducted a survey to determine "whether it is possible to identify certain basic principles, or . . . 'common denominators', in those legal systems which embody the *principles* which must be adopted in the international context."

Upon completing its survey, the trial panel found that the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[26]

This definition adopted a traditional formulation of the actus reus of rape. Section (a) and the first clause in section (b) were taken verbatim from the trial verdict in Furundžija. The Kunarac definition, however, removed "coercion or force or threat of force" from the Furundžija definition and instead adopted "lack of consent" as an element. At trial, the prosecutor argued that lack of consent was not an element of the crime of rape but force and coercion were. The trial panel disagreed with the prosecutor based on its survey of major legal systems; it stated that "the basic underlying principle common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim."

26 P. Weiner (2013), "The Evolving Jurisprudence of the Crime of Rape in International criminal Law", Boston College Law Review, Vol. 54, Issue. 3, p. 1213.

The panel reasoned that it did not disavow earlier jurisprudence regarding rape, and explanation of relationship between force and consent was sought.[27] It stated: "Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape." The appeals panel further noted that a "narrow focus on force or threat of force" would be inappropriate and allow for "perpetrators to evade liability."

By excluding force as an element of rape, the appeals panel significantly changed the elements of the crime. The appeals panel stated that the trial panel did not reject the Furundžija definition of rape, but simply "sought to explain the relationship between force and consent." Close review of the decision, however, does not support this view. The elements of the actus reus identified in the two cases are clearly different. In fact, force and consent have traditionally served as separate and distinct elements, "each of which must independently be satisfied." Force, threats, and coercion focus on the acts of the accused, whereas voluntary consent relates to the mental state of the victim.

The International Criminal Court (ICC) Definition

Those who established the International Criminal Court (ICC) had the opportunity to review and consider the ICTY and ICTR cases when they developed the elements of the crime of rape for the ICC. In the ICC, the elements of rape are the same regardless of whether rape is prosecuted as a war crime or as a crime against humanity. The ICC defines the actus reus of rape as:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, how body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[28]

27 Ibid., p. 1214.

28 Ibid., p. 1217.

The ICC derived this definition from the Akayesu, Furundžija, and Kunarac judgements. The first paragraph effects a compromise between the traditional and the more expansive definitions of the sexual act of rape by allowing for prosecution of various forms of forced sexual activity that has not been covered under most traditional definitions. Another point that must be noted is that the definition is also gender neutral with respect to both the perpetrator and the victim of the act of rape.[29] The ICC utilises "force or coercion" as an element and gives broad latitude to the terms "coercion" and "force" in order to anticipate the full range of circumstances arising, especially, in the time of war. By including language concerning acts "committed against a person incapable of giving genuine consent," the ICC's definition also recognizes that certain persons, due to age, mental or physical condition, or infirmity, are incapable of providing consent to sexual activity.

Although mens rea is not included within the elements of the crime, yet the Article 30 of the Rome Statute of the ICC requires that the "material elements are committed with intent and knowledge". Therefore, to have the required mens rea, the perpetrator must (1) have the intent to invade the body of a person resulting in penetration, and (2) must know that the invasion was committed through the use of force, threats, coercion or by taking advantage of a coercive environment, or a person who is incapable of voluntarily consenting.

In comparison with the Statutes of the ICTR and the ICTY, the Rome Statute was believed to be the 'most advanced articulation in the history of gender based violence'.[30] Rape has been interpreted by the ICC in terms of constituting genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,"[31] a crime against humanity "when

29 This is an important modification because men were also victims of rape during the armed conflict in Bosnia and Herzegovina.

30 B. Inder (2010), Womens Initiatives for Gender Justice, Making a Statement: A Review of Charges and Prosecutions for Gender Based Crimes before the International Criminal Court, Available at; http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf

31 Rome Statute Article 6 (defining genocide), cited from R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", Cornell International Law Journal, Vol. 44, No. 1 p. 22.

committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,"[32] and a war crime "when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[33]

Moreover, the statutes of the ICTR and ICTY did not list crimes of sexual violence other than rape. Even in the case of rape, the statutes of the two ad hoc tribunals included it as a crime against humanity omitting it from the other categories of crimes. The Rome Statute, on the other hand, recognises a spectrum of gender based crimes in addition to rape, which include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other sexual violence of comparable gravity.[34] This separate identification was essential in order to recognise the distinct characteristics of the different crimes. In addition to the crimes of sexual and gender violence, persecution is included in the ICC Statute as a crime against humanity and it specifically includes for the first time the recognition of gender as a basis for persecution. The ICC Statute also includes trafficking as a crime against humanity as among the crimes of enslavement.[35] Thus, Rome statute is an improvement upon the statutes of the ICTR and ICTY as it specifically enumerates both rape and different forms of sexual violence as war crimes.

Despite the fact that the Rome Statute has comprehensive provisions related to gender crimes, it fails to fulfil its obligation to investigate, charge, and prosecute

32 Rome Statute Article 7 (1), cited from Manjoo, R, and McRaith, C, "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", Cornell International Law Journal, Vol. 44, No. 1, Winter 2011, p. 23.

33 Rome Statute Article 8 (2) (b) (xxii) (listing "rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7 (2), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Convention" as war crime), cited from R. Manjoo, and C. McRaith, "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", Cornell International Law Journal, Vol. 44, No. 1, Winter 2011, p. 23.

34 Rome Statute Article 7(1)(g).

35 "Gender Mainstreaming in the Statute of the International Criminal Court", Prepared by the Women's Caucus for Gender Justice, http://www.iccwomen.org.

these crimes. This becomes evident if one looks at the ICC's first case, *Lubanga*,[36] in which no gender-based charges were brought despite overwhelming evidence of such crimes.

The Special Court of Sierra Leone (SCSL) Definition

The Special Court of Sierra Leone (SCSL) has also dealt with the issue of defining the crime of rape. Initially, in the 2007 case of *Prosecutor v. Brima, Kamara & Kanu*, the accused were charged with rape as a crime against humanity.[37] After reviewing the jurisprudence of the ICTY, ICTR, and ICC, the trial chamber adopted the following definition of rape:

1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
2. The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[38]

The chamber reviewed the history of rape as a war crime and identified the elements as follows:

(i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;

(iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

36 The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06).

37 Case No. SCSL- 2004-16-T, Trial Judgment, 14, 210.

38 P. Weiner (2013), "The Evolving Jurisprudence of the Crime of Rape in International criminal Law", Boston College Law Review, Vol. 54, Issue. 3, p. 1219.

(iv) The Accused knew or had reason to know that the victim did not consent.[39]

The first two paragraphs are directly derived from the ICC's definition of rape. The third and fourth paragraphs have their origin from the Kunarac trial judgment, which are, however, not included in the elements identified by the ICC.

Conclusion and Recommendations

Over the years, developments with respect to understanding the crime of rape within international law are evident. Review of these developments, however, shows that international courts and tribunals are inconsistent in the way they understand the crime of rape, with differences centering primarily on the following issues:

(1) whether force or lack of consent is an element of the crime;

(2) whether a general or a more mechanical description of the sexual act must be used in the definition; and

(3) how concern for fairness for the victim should be balanced with protection of the rights of the accused.

Many still argue that despite inconsistencies, some kind of codification of law in this area did take place. However, whether the codification of such laws can be translated into the practical protection of women during conflict remains to be seen.

39 P. Weiner (2013), "The Evolving Jurisprudence of the Crime of Rape in International criminal Law", Boston College Law Review, Vol. 54, Issue. 3, p. 1220.

A Call For Tobin Tax

Tanmoy Majilla[*] & *Orlaine Pereira* [**]

Introduction

'This time is Different', yes, we do have more stable monetary authority, more productive human capital, more innovative financial institutions, but still things seem to be out of control. We all are surprised with the headlines how Rupee is depreciating in a massive scale and becoming extreme volatile. Assuming we are not living in a paradise, erratic movements in foreign exchange market can be disastrous for any country. For a country already suffering from current account deficit excess volatility in foreign exchange market, through which it intends to fund deficit, can be catastrophic. The financial instability has prompted calls for a new financial architecture. Groundless speculation, we dare to argue, is the most important factor for excess volatility in FX market. Although Free trade is possible for an Investor between different countries and currencies, Governments of all countries regulate their Capital Market to prevent volatility and fluctuations in exchange rate. In 1970 the late James Tobin, Professor at Yale, a Nobel Laureate, proposed a currency transactions tax that can be imposed in order to slow down speculative movements of currency. His suggestion achieves significance in a Global economy where exchange rate fluctuations are transmitted between countries that affect employment, output and inflation. Advocates of the tax today argue that a Tobin Tax can reduce "speculative" short term trading (Summers and Summers, 1989; Stiglitz, 1989 and Rubenstein 1992) and distribute the burden of the costs of the global financial crisis more equitably. This small tax can give government's greater ability to manage their own domestic monetary and fiscal policy. Since the 70s this proposal has been changed in several ways to have a two tier tax, to include taxes on sales of international securities and several other variations. Recent financial instability opens a new window for debate. This Tax achieved

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new significance in Indian context when former RBI Governor Y.V. Reddy (Reddy 2011) proposed the same. Question is whether Tobin tax is necessary and off course feasible?

Question of Necessity

On the verge of recent financial crisis, keeping in mind of 1994 Mexico, 1998 East Asia, 1998 Russian financial crisis and speculation attack on French Franc in 1982 and on Swedish Kroner and Pound Sterling in 1992, we have seen the catastrophic effect of dangerous speculation. Prof. Tobin proposed a small transaction tax, as small as one tenth, can reduce currency volatility by simply discouraging speculation. But the question arises whether a small tax of one tenth would deter speculators from attacking overvalued currency when expected gain is high? We are missing the point here. Tobin tax is meant to deter baseless speculation. Tobin tax is not designed to affect long term 'fundamental' investors but short term risk neutral speculators.

The typical challenge comes from the Chicago school. They argue that speculation is the market stabilising force. When actual price exceeds warranted price, speculators infer that currency is overvalued and sell it. This means speculation drives down the price to the market clearing level. When actual price is less than warranted price, same speculation drives up price to the market clearing level. But the problem is with self fulfilling expectations. Even new classical rational expectation models predict existence of self fulfilling bubble. All that is needed is that market participants expect that the future price will be higher, and they will buy now in anticipation of this higher future price. In this fashion, "market beliefs" can become the driving fundamental, and if speculators share and shape this belief they can drive prices away from the level warranted by economic conditions. Scheinkman and Xiong (2003) conclude that "In equilibrium, bubbles are accompanied by large trading volume and high price volatility." Their analysis also shows that Tobin's tax can substantially reduce speculative trading when transaction costs are small. Whereas a very recent paper by Becchetti et al. (2013) finds that introduction of the French Tobin tax has a significant impact in terms of reducing transaction volumes and intraday volatility.

Main problem is with the 'noise traders'. Because of their indifference to risk they earn a higher rate of return than ordinary risk-averse persons. As a result, noise traders could dominate the market. And though the market remains stable, it produces socially sub-optimal outcomes. Recent economic literature incorporates the principle of herd behaviour. This theory argues and theoretically proves that if first two investors choose an instrument then it is always optimal for the third investors to follow them. Such investors rely on current market sentiment i.e. selling the instrument when it is the primary market sentiment and buy otherwise. This argument has driven out Chicago school of thought. Herding provides false signals to Capital markets and could lead to bubbles.

Speculators may cause damage to other market participants when they cash out of their investments. This seems to have been particularly prevalent in East Asia, where the decision to cash out and repatriate investments led to a fall in the exchange rate and hence increase the debt burden of those East Asian entrepreneurs who had used foreign currency borrowings to finance their business expansions. In such instances, speculators impose a negative externality on other investors. A Tobin tax can deter this short term speculator and encourage long term 'fundamental' investors.

This is beyond doubt that a Tobin tax discourages short term transactions. The question is if it generates a possibility of 'thin' market? A 'thin' market is defined as a market with a low number of buyers and sellers. Since few transactions take place in a thin market, prices are often more volatile and assets are less liquid. Thus are we in a paradox where Tobin tax is increasing volatility, rather that eliminating it but financial market is so huge that it is less likely to become a thin market. Again Tobin tax may at first increase transaction cost but it also reduces volatility risk premium, which can encourage long term 'fundamental' investors. On the positive side of Tobin tax is that it may actually increase international trade by reducing currency risk.

Another argument says that a small one-tenth tax may not be very effective at the time of crisis. Again many argue Tobin tax cannot prevent financial

crisis. Tobin tax is not meant for eliminating financial crisis rather than reducing the probability of crisis. Tobin tax can be part of financial reform package as a precaution against financial crisis and also effective in boom time. Prof. Spahn proposes a two tier Tobin tax to overcome that difficulty, a one-tenth tax under normal circumstances and can go as high as 15 % at the time of crisis, which can be argued as a more effective policy instrument (Spahn 1995). He suggested enforcing a band within which exchange rate could fluctuate. When the bandwidth is surpassed, currency transaction tax with an additional exchange surcharge could be inflicted. The surcharge could be short-term monetary policy stabilizing tool. The surcharge would be dormant as long as FX market is functioning effectively. This is similar to European Monetary System's way of achieving exchange rate stability within an acceptable bandwidth. One more important thing is that because of huge daily transactions Tobin tax can generate significant revenue, which can be used for general welfare.

Case(s) of Tobin Tax

In the light of the recent global financial crisis that hit the International financial markets, much emphasis has been placed on adequate regulation and stringent monitoring of financial markets. The concept of "Too big to fail" has become redundant in view of subprime crisis in US. The government bailouts of large investment banks were considered vital as they adversely affect financial markets domestically and internationally. The crisis impacted stock markets around the world, prolonged unemployment, contraction of credit, restricted International trade as well as initiation of Euro zone crisis. Many countries have exercised the concept of currency tax suited within their sovereign confines. The empirical evidence that supports implementation of currency transaction tax or financial transaction tax can be found for numerous countries.

State Name	Type of Tax
European Union	In September 2011, European Commission proposed harmonized FTT throughout 28 member states of European Union. The minimum tax rates foreseen were 0.1% for the trading in shares and bonds, and 0.01% for derivative agreements such as options, future contracts for difference or interest rate swaps. On 22nd January 2013, after unanimous decision by 11 member states in support of FTT, the European Council passed a decision allowing introduction of a financial transaction tax (FTT) through enhanced cooperation. But the matter still remains debated due to complications in European legal framework. The 11 member countries are Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia.
Finland	Finland imposes a tax of 1.6% on the transfer of certain Finnish securities mainly equities such as bonds, debt securities and derivatives. The tax is charged if the transferee and/or transferor is a Finnish resident or a Finnish branch of certain financial institutions. Prime Minister Jyrki Katainen of National Coalition Party decided that Finland will not join a group of 11 other European Union states that have signed up in favor of a financial transaction tax unless the tax is widely adopted across the EU.
United States	United States had imposed FTT from 1914 to 1966 on sale of stock and transfers. At present, very minor 0.0034% tax which is levied on stock transactions. In 2009, numerous US financial transaction tax (US FTT) bills have been proposed in Congress which differs on the tax size. The "Let Wall Street Pay for the Restoration of Main Street Bill" was proposed by Peter DeFazio from the House of the Representative and Sen. Tom Harkin from the Senate in December 2009 suggesting to tax of 0.25% on stock transactions, a tax of 0.02% on futures contracts and credit default swaps taxed at 0.02%. The bill was however not enacted.http://en.wikipedia.org/wiki/Financial_transaction_tax - cite_note-Page-5
United Kingdom	The UK Finance Act 1986 introduced the Stamp Duty Reserve Tax (SDRT) at a rate of 0.5% on purchasing UK shares. The tax is applicable on purchase of existing shares of UK companies. The tax automatically gets deducted through CREST System.

State Name	Type of Tax
Colombia	Almost all individuals who access financial markets have bank accounts within the country where gains or losses incurred are debited. In 1998, Colombian government introduced a debit tax (tax imposed on all financial transactions that involves withdrawal of money from bank account). The tax is still operational and has been enhanced from 0.2% to 0.4% of transaction amount.
Taiwan	Taiwan introduced Securities Transaction Tax of 0.3% on shares and 0.1% on bonds. Commencing from 1 January 2010 for 7 years, to revitalize Taiwanese bond market, trading of corporate bonds and financial bonds were exempt from STT by Taiwan government. Taiwan also levied Futures Transaction Tax between 0.0000125% and 0.06% on the value of Futures contract and between 0.1% and 0.6% on Options based on premium paid.
India	In 2004, India introduced Securities Transaction Tax (STT) in equity markets at the rate of 0.125% on a delivery-based buy and sell transactions and 0.025% on non delivery-based sale transactions. The rate of 0.017% is charged on F&O sale transactions. Imposed on both foreign and domestic investors, the STT is collected by the stock exchanges from the brokers and passed on to the exchequer. Commodity Transaction Tax (CTT) at 0.01% is levied on various non-agricultural commodities, including gold, crude oil and base metals, processed farm items like sugar, soya oil and guar gum under CTT with effect from July 1, 2013 and would be paid by the seller. The tax is levied on futures trading and not on spot trading in the commodities.
Hong Kong	Under transfer of immovable property, a tax rate of upto 4.25% of sales price or property's fair market value, whichever is higher is imposed. And 0.2% STT on the sale of shares.
Switzerland	A 1% stamp duty is imposed on the issuance of equity of more than CHF 1 million; issuance of bonds carries 0.06% or 0.12% per annum until the bonds mature. The transfers of shares and bonds by a Swiss securities dealer incurs stamp duty of 0.15% for Swiss securities or 0.3% for foreign securities (some exceptions).

Question of Feasibility

Now we turn into feasibility question. Many argue that introducing a currency-only transaction tax and no tax on non-currency financial transactions is not a feasible option. Tobin's tax is a simple transaction tax on one currency trades across border, as money moves to countries with higher interest rates. If Investors suddenly remove money from a country to acquire short term profit, countries need to raise interest rates to still be attractive. Higher interest rate is still disastrous for an economy as realized from the currency crisis of Mexico and Russia. If only one country imposes Tobin Tax, investors will shift to countries where such a tax is not imposed. For Tobin Tax to be successful, Global consensus is required. But this problem is same as whenever we are dealing with global public goods, like climate change, carbon trade, tariff regime etc. To achieve an international consensus is easier for Tobin tax as most of the currency trade happens in eight to ten countries. Furthermore, establishing a de facto global standard will be facilitated by the fact that currency trading is highly concentrated.

Conclusion

It is beyond doubt and apparent that financial market will innovate instruments to avoid Tobin tax. But this does not question the merit of Tobin tax rather it affirms that policies need to be dynamic and adapt with change in times. A transaction tax reduces short-term trading, but it is also an insurance against currency and interest risks. Although this may be the case, the welfare effects of Tobin tax for the Indian economy are ambiguous. India being a nation with a large number of population, still struggles with less than 1$ daily, the economy is reeling under a high level of current account of deficit; stability is the main precondition for achieving her desired position. What can be more devastating than the fact that when an economy, struggling in domestic sector, has to counter with speculation attack in external market? For India a Tobin tax rather seems a necessity. There are many evidences that foreign exchange markets do not currently operate in a theoretical optimal ideal. On the other hand, there is

at least some evidence that Tobin Tax might tackle short term speculation. Rather than taking a prefabricated ideological stand, isn't it a time to take a 'positive' way-out as opposed to a 'normative' one.

The 'Blues' of the Green Tribunal Act

Savio J F Correia[*]

Introduction

The National Green Tribunal Act, 2010 is a classic case of judge-driven reform. Undoubtedly a path breaking legislation that is unique in many ways, it provides a new dimension to environment adjudication by curtailing delays and imparting objectivity. Given its composition and jurisdiction, including wide powers to settle environment disputes and providing relief, compensation including restitution of environment, the Tribunal is envisaged to be a specialized environment adjudicatory body having both original as well as appellate jurisdiction. The object of the Act is to give effect to international obligations arising out of various decisions taken at international conferences to which India had been a Party and also to implement apex court pronouncements that the right to healthy environment is a part of right to life under Art 21 of the Indian Constitution.[1]

However, there are concerns in terms of the way the legislation was drafted without much public consultation or debate; several of its critical provisions are inarticulate and leave loopholes or scope for misinterpretation. A few of these are culled for critical analysis.

Section 2 (i) (m): (a) Substantial Question Relating to Environment

S. 2 (1) (m) defines "substantial question relating to environment" as including any instance where: there is a direct violation of a specific statutory environmental obligation by which, -

(a) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or

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1 Aruna Venkat, Environmental Law and Policy, 123 (2011).

(b) the gravity of damage to the environment or property is substantial; or

(c) the damage to public health is broadly measurable;

the environmental consequences relate to a specific activity or a point source of pollution;

In the researchers opinion, the Act limits the Tribunals' jurisdiction to "substantial questions relating to environment"; whether the given facts canvassed by the petitioner fall within the ambit of 'substantial questions relating to environment' is left to the subjective assessment of an individual to judge. There is bound to be conflicting opinions delivered by the Tribunal on this count. Calcutta High Court ruled that noise pollution caused by a sewing machine shop causing inconvenience to the (individual) petitioner did not constitute "substantial question relating to the environment".[2] In a recent pronouncement in Goa Foundation v. Union of India,[3] the National Green Tribunal itself considered the issue of interpretation of the term and its jurisdiction in entertaining applications, and held:

The second ingredient is "Substantial Question of Environment". The Tribunal, after taking into consideration various sources for the meaning of the term "Substantial Question" said, "To put it aptly, a substantial question relating to environment must, therefore, be a question which is debatable, not previously settled and must have a material bearing on the case and its issues relating to environment. Thus, disputes must relate to implementation of the enactments specified in Schedule I to the NGT Act.

When it comes to a question of the environment under the NGT, It is not individual or a person centric but is socio-centric, as any person can raise a question relating to environment, which will have to be decided by the Tribunal with reference to the dispute arising from such a question.

2 Shib Shankar Sarkar v. State of West Bengal, W.P. 11838 (W) of 2011, January 7, 2013 (Arun Mishra CJ, Joymalya Bagchi J.), (High Court of Calcutta).

3 Goa Foundation v. Union of India, Application no. 20 of 2012, July 18, 2013 (Swantantra Kumar J, U D Salvi J, Dr D K Agarwal, Prof A R Yousuf & Dr R C Trivedi) (National Green Tribunal).

Unlike the Supreme Court, the Tribunal doesn't have extraordinary jurisdiction. The tribunal has to examine as to whether, within the framework of the NGT Act and while keeping in mind the scheme of the same, its objects and purposes, generally such a petition would lie before the Tribunal or not. In a civil case which raises a question relating to environment, the Tribunal shall have jurisdiction to decide disputes arising out of such a question. Therefore, there is no need to carve out any exception for exclusion which is not spelt out by the legislature itself.

Section 20 of the NGT Act provides that the Tribunal shall take into consideration the three principles — principle of sustainable development, precautionary principle and the polluter pays principle. On the cogent reading of Section 14 with Section 2(m) and Section 20 of the NGT Act, likely damage to environment would be covered under the precautionary principle, and therefore, provide jurisdiction to the Tribunal to entertain such a question. In action in the facts and circumstances of a given case could itself be a violation of the precautionary principle, and therefore, bring it within the ambit of jurisdiction of the Tribunal, as defined under the NGT Act. Section 2(m) brings into play a direct violation of a specific statutory environmental obligation as contemplated under Section 5 of the Environment Act as being substantial question relating to environment. These provisions, read with Section 3(1) and Section 5 of the Environment Act, which place statutory obligation and require the Government to issue appropriate directions to prevent and control pollution, clearly show that the legislature intended to provide wide jurisdiction to the Tribunal to deal with and cover all civil cases relating to environment.[4] Whether the foregoing would be any consolation to lawyers and environmentalists is uncertain. It brings us back to the fact that the question will be left open to the objectivity of the Tribunal Bench of the given day to interpret in a factum of the case before it. One thing is for certain; the defence that the case is not one of 'substantial question relating to the environment' could be a standard preliminary objection of the respondents in every petition.

4 Ibid.

The usage of word "substantial" is very subjective. It will vary from person to person to define what is substantial with respect to environmental degradation. There is no tangible method by which the gravity of the damage to environment and public health can be measured in general. Though the Act tries to define the word substantial, but still doubts hover as to how the word substantial is interpreted by different experts. The Act says that an action can be taken if there is a direct violation of specific statutory environmental obligation and community at large is affected. What if, there is direct violation of specific statutory environmental obligation and community at large is not affected. It should have simply stated if there is direct violation of statutory environmental obligation, it becomes legal wrong and an individual or group of individual can approach NGT. In addition, the Act says if there is direct violation of specific statutory environmental obligation by which environmental consequences relate to specific activity or point source. The "environmental consequences" cannot be restricted to either "specific activity or to a point source of pollution" as is provided, because non-point source of pollution and a bundle of industrial activities are also a major contributor to pollution load.[5]

'Environmental Consequences'

Use of the term "environmental consequences" in the definition ought not to be restricted to either "specific activity or to a point source of pollution" as is stipulated in the Bill because non-point source of pollution and a bundle of industrial activities leading to cumulative impacts on the environment require as much adjudication as specific activities with obvious impacts. In the researchers opinion, the provision is regressive as it only includes instances where the "community at large" is affected or likely to be affected, but excludes 'individuals' or 'groups of individuals'. This is contradictory to the settled principle of locus standi where the courts have emphasised on liberal approach to be followed when environmental matters are concerned. Environmental impact and conflict need not be only limited to the "community at large" but

5 Centre for Science and Environment, National Green Tribunal: A new beginning for environmental cases? (2011), available at http://www.cseindia.org/node/2900 (last visited on May 4, 2014).

may also affect groups of individuals and individuals—who deserve as much protection—in equal measure as the "community at large" which itself has been left undefined.

It is interesting to note while the right to Article 21 of the Constitution is a fundamental right guaranteed to individuals, the Act seeks to deny to the same individuals and groups of individuals the right to question any environmental consequence that affects them unless it also affects the community at large or public health. However, individuals can approach the court when the damage to the environment or property is substantial. The definition of the expression "substantial question relating to environment" as given in the Act which provides for statutory exclusion of individuals may not stand judicial scrutiny, for, the right to healthy environment, in its wide amplitude, subsumes all aspects of environmental degradation. Again, it is doubtful whether the jurisdiction of the High Court which are constitutional courts can be excluded either by ordinary legislation or by a constitutional amendment as their power of judicial review is a part of the basic structure of the Constitution.[6]

Section 14 (1): 'Implementation' of Enactments

Sub-section (1) of S. 14 stipulates that the Tribunal shall have jurisdiction over all civil cases where a substantial question relating to the environment (including enforcement of any legal right relating to the environment) is involved, and such question arises out of the implementation of the enactments specified in Schedule I.[7] The use of the term "implementation" is cause for concern and is a loophole in the most critical part of the statute having the potential of confusion and misinterpretation. In any case, it does not reflect the intention of Parliament and the plethora of Apex Court pronouncements on the concept

6 Aruna B Venkat, The National Green Tribunal Act 2010: An Overview, 6 (1), NALSAR Law Review, 102 (2011).

7 Schedule I: 1. The Water (Prevention and Control of Pollution) Act, 1974; 2. The Water (Prevention and Control of Pollution) Cess Act, 1977; 3. The Forest (Conservation) Act, 1980; 4. The Air (Prevention and Control of Pollution) Act, 1981; 5. The Environment (Protection) Act, 1986; 6. The Public Liability Insurance Act, 1991; 7. The Biological Diversity Act, 2002.

of specialized environmental courts, including the recommendation of the Law Commission of India. Implementation of statutes set out in Schedule I is mandated for the Central and State Governments to perform, as the case may be, and would include in its scope the creation of institutional mechanisms for their implementation. The purpose of setting-up of the environmental court inter alia was to look into complaints of violations of environmental laws and statutes. It would be the violation of the statutes set out in Schedule I that would give rise to substantial questions of law. The sub-section is not happily worded; the use of the term "violation" instead of "implementation" would have been more appropriate, in the researchers view.

Section 16: An Appellate Forum for Industry?

An important aspect of the National Green Tribunal Act is that it enables an entrepreneur or industry aggrieved by the rejection of environmental clearance and biodiversity benefit sharing orders to invoke the Tribunal's appellate jurisdiction for relief. This has not gone down well with environmental activists as it is their case that the Tribunal was established primarily for environmental protection. Noted environmental lawyer Ritwick Dutta and his associates in their critique of the National Green Tribunal Bill 2009 commented thus:

The Bill inexplicably expands the definition of an 'aggrieved person' who can approach the Tribunal, to include any person aggrieved by an order 'refusing the grant of environmental clearance'. [Clause 16 (i)]. It has to be clearly ensured in the Bill that only those affected adversely by grant of approval orders under enactments mentioned in Schedule I which impact their environment (including forests and biodiversity) can approach the Tribunal. This is because the Tribunal is meant for the protection of environment. Hence it must redefine an aggrieved person to mean a 'person' who has been wronged through damage to the person's natural environment or suspects (on valid grounds) that such damage is likely to happen unless prevented. Thus Clause 16 (i) should be deleted as being misplaced in a bill devoted to environmental protection. Provision of appeal if any, against refusal to grant environmental, forest or

biodiversity clearances/approval under the enactments mentioned in Schedule I, should lie elsewhere, than this Tribunal.[8]

In addition to the customary extension of 'person' to 'artificial juridical persons', there is reason to believe that courts, as they have done in the past, will read 'aggrieved person' expansively. In *Prafulla Samantra v. Union of India,*[9] the Delhi High Court held that 'aggrieved persons' includes 'public spirited interested persons, environmental activists and such other voluntary organizations working for the community as a whole'. A range of actors will in theory be able to approach the National Green Tribunal. Dedicated climate litigants are likely to bring their claims before the Tribunal.[10]

Section 20: Why not 'Doctrine of Public Trust' as A Guiding Principle?

Section 20 prescribes that the Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle. This provision lays down the guiding principles for the Tribunal, and stems from the acceptance of the three principles laid down by the Supreme Court to be the bedrock of environmental law of this country.[11] Following these principles, in the researchers opinion, ought not to be the sole guiding principle for the Tribunal, but also ought to encompass the much needed "doctrine of public trust", which has been accepted as part of Indian law when question of environmental law is taken into account.[12] The draftsman, however, included the other guiding principles laid down by

8 Ritwick Dutta et al, Towards a Green Future or Green Signal for Violators: The National Green Tribunal Bill 2009, 8, The Access Initiative - India (TAI) Coalition New Delhi (2009).

9 Prafulla Samantra v. Union of India, Writ Petition (C) 3126/2008, May 6, 2009 (S Ravindra Bhat J) (Delhi High Court).

10 Richard Lord QC et al, Climate Change Liability: Transnational Law and Practice, 157 (2012).

11 See Vellore Citizens Welfare Forum v. Union of India, [1996] 5 SCC 647.

12 See Ritwick Dutta et al, Towards a Green Future or Green Signal for Violators: The National Green Tribunal Bill 2009, 8, The Access Initiative - India (TAI) Coalition New Delhi (2009).

the Apex Court that are now part in Indian environmental law, namely, the principles of sustainable development, the precautionary principle and the polluter pays principle in Section 20 of the Act. The Act does not elaborate upon the content of these principles. The NGT thus, could validly draw upon from the sources of international environmental law as well as the rich jurisprudence crafted by the Supreme Court of India.[13]

Section 22: Application of Section 100 of Civil Procedure Code in Appeals to Supreme Court

Section 22 provides that any person aggrieved by any award, decision or order of the Tribunal may file an appeal to the Supreme Court within ninety days from the date of communication of the award, decision or order of Tribunal to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908. Though it deals with the High Court's jurisdiction in second appeal, it has the effect of declaring that the first appellate court is the final court on facts and the High Court in a second appeal cannot re-appreciate evidence or facts unless the case involves a substantial question of law.[14]

What Then is Substantial Question of Law in Environmental Cases?

The test to determine whether a question is a substantial question of law or not is laid down by a Constitution Bench of the Supreme Court in *Chunilal Mehta and Sons Ltd.* v. *Century Spg. and Mfg. Co. Ltd.*[15] while determining the said expression occurring in Article 133(1) of the Constitution of India. The Supreme Court laid down the test as follows:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance

13 See Saptarishi Bandopadhyay, Because the Cart Situates the Horse: Unrecognized Movements Underlying the Indian Supreme Courts Internalization of International Environmental Law, Vol. 50 (2010), Indian Journal of International Law, 204 (2010).

14 Dr R Prakash, Scope of High Court's Jurisdiction under Section 100 of the Civil Procedure Code, 1908, 2003 (5) SCC (Jour) 7 (2003).

15 1962 Supp (3) SCR 549.

or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law." [16]

The above test laid down by the Supreme Court would have to be applied by itself to acquire jurisdiction under S. 22 of the National Green Tribunal Act, 2010.

Where Does an Appeal Lie, in the Supreme Court or High Court?

The provisions of S. 22 read with the provisions of S. 29 of the Act come under scrutiny in view of a recent order of the Madras High Court that entertained an appeal from an order of the Tribunal. A Division Bench comprising Justice N Paul Vasanthakumar and Justice P Devadass[17] held that high courts did have jurisdiction to entertain appeals against the orders of the NGT. The order, enabling litigants hit by orders of the NGT to file appeals in the high court, was passed by the division bench, which clarified a grey area arising out of a provision in the NGT Act, which says appeals against NGT orders can be filed only in the Supreme Court. "Section 29 of the NGT Act, 2010 deals with bar of jurisdiction of civil courts, and the jurisdiction of the high court under Article 226/227 is not ousted under the Act," the bench said. Referring to the apex court order permitting high courts to entertain appeals against Armed Forces Tribunal orders, the judges said compared to the NGT Act, the Armed Forces Tribunal Act was too stringent. "Still, the Supreme Court permitted high courts to entertain petitions under Article 226 against the orders of the tribunal," they said. Following an adverse order by the southern bench of the

16 State Govt of NCT of Delhi v. Sunil & Anr, (2001) 6 SCC 652.

17 Order dated February 4, 2014.

NGT, a Karnataka-based company had approached the high court to file an appeal. After the court registry doubted the very maintainability of the appeal in view of the statutory bar in the NGT Act, the matter was brought to the notice of the bench, which said appeals could indeed be filed in the high court.[18]

In *L. Chandra Kumar v. Union of India and others,*[19] a seven-judge bench of the Supreme Court held that clause 2 (d) of article 323A and clause 3(d) of article 323B, to the extent they authorize Parliament to exclude the jurisdiction of the High Courts and the Supreme Court under articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of articles 323A and 323B would, to the same extent, be unconstitutional. The Court held that the jurisdiction bestowed upon the High Court's under Art 226/227 and upon the Supreme Court under Art 32 of the Constitution is part of the unchallengeable basic structure of our Constitution.

All decisions of the Administrative Tribunals are subject to analysis before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls.[20] The Supreme Court laid down that:

(i) The powers of judicial review on legislative action vested in the Supreme Court and High Court under Art.32 and 226 from part of the basic structure of the Constitution.

(ii) The power of High Courts under Art.227 to exercise superintendence on all courts and tribunals under its jurisdiction is also basic to the constitution and therefore even if tribunals are allowed the power to perform judicial review, they may do it in a supplementary role and not as substitutes to the High Courts.

18 A. Subramani, High Court can hear appeal against National Green Tribunal orders, The Times of India (February 5, 2014), available at http://timesofindia.indiatimes.com/city/chennai/High-court-can-hear-appeal-against-National-Green-Tribunal-orders/articleshow/29876486.cms (last visited on May 4, 2014).

19 L. Chandra Kumar v. Union of India and ors, JT 1997 (3) SC 589.

20 Letter from Dr. Justice A. R. Lakshmanan, Chairman Law Commission of India to Dr H. R. Bharadwaj, Union Minister for Law & Justice (December 17, 2008), available at http://lawcommissionofindia.nic.in/reports/report215.pdf (last visited on May 4, 2014).

(iii) Though tribunals may act as courts of first instance for the areas they are dealing with, they are subject to the appeal jurisdiction of a Division Bench of the High Court under whose jurisdiction they fall.

(iv) Though tribunals can examine the constitutionality of statutes, the power does not extend to the parent statute under which they are constituted.

(v) In order to supervise the administration of tribunals and to increase their efficiency an independent agency has to be set up and till then a nodal Ministry has to see to these aspects.

Consequently Articles 323A (2) (d) and 323B (3) (d) of the Constitution were held to be unconstitutional.[21]

In the researchers' analysis, with due respect, it is felt that the interpretation of the Madras High Court is a violation of doctrine of separation of powers by the judiciary. There is no question of filing an appeal before the High Court, more so where there is a remedy provided under the relevant statute. No doubt, Art. 226 is always available against judicial and quasi judicial and other administrative actions, but it cannot be stretched to vest the High Court with powers of an appellate authority over orders of a specialized statutory tribunal. It would also be worthwhile to mention that in the Oleum case the Supreme Court had suggested that appeals from the specialized environment court ought to be directly before it. What would happen to a pending environment-related petition transferred by the High Court to the National Green Tribunal; would the High Court sit in appeal over an order of the Tribunal in the matter?

Section 25: How easy will execution of Tribunal orders be?

Section 25 deals with execution of awards and orders or decisions of the Tribunal. It provides that these shall be executable by the Tribunal as a decree of a civil court, and for this purpose, the Tribunal shall have all the powers of a civil court. Sub-section (2) provides that, notwithstanding anything contained in subsection (1), the Tribunal may transmit any order or award made by it to a civil court having local jurisdiction and such civil court shall have to execute

21 See L. Chandra Kumar Supra n. 19.

the order or award as if it were a decree made by that Court. Sub-section (3) further provides that where a person responsible, for death of, or injury to any person or damage to any property and environment, against whom the award or order is made by the Tribunal, fails to make the payment or deposit the amount as directed by the Tribunal within the period so specified in the award or order, such amount, without prejudice to the filing of complaint for prosecution for an offence under this Act or any other law for the time being in force, shall be recoverable from the said person as arrears of land revenue or of public demand.

Way back in 1872, the Privy Council had observed that "the difficulties of a litigant in India begin when he has obtained a decree...".[22] The situation is no different today, in 2014. It is in this backdrop that I would analyze the provisions of Section 25 of the Act, in particular, those of sub-section (2). Transmission of an order or award by the Tribunal to a civil court could well turn out to be the weakest link in the chain for realizing the fruits of a favorable decree under the Act. The litigant would be relegated to dealing with complex procedural technicalities coupled with delay tactics and perennial delays associated with regular civil courts, more so in execution cases. There are several judicial precedents (such as Jolly Varghese case[23]) that have restricted the powers of executing courts in execution of money decrees and matters of civil imprisonment etc. One of the objects of the National Green Tribunal Act was to ensure speedy justice to victims of environmental accidents and the like. The provisions of this clause could be a kind of dampener on the very purpose of the enactment.

It is pertinent to note that while similar provisions existed in the Consumer Protection Act, 1986,[24] seeing the difficulties faced by consumers/litigants,

22 General Manager of the Raj Durbhunga v. Maharaj Coomar Ramaput Singh, (1872) 14 M.I.A. 605.

23 Jolly George Varghese v. The Bank of Cochin, AIR 1980 SC 470.

24 The Consumer Protection Act, 1986 (Act no. 68 of 1986).

appropriate amendments were made in 2002[25] to overcome the difficulties, and the provision to transfer decrees to civil courts was done away with.

The Tribunal will grant the relief prayed for; but to execute the relief obtained, the litigant would be relegated to the civil court of appropriate jurisdiction. Such civil court (of appropriate jurisdiction) could be located hundreds of kilometers away. For example, the headquarters of an industrial concern could be located in New Delhi while the industry set up could be located in the State of Tamil Nadu. In such a situation, the Tribunal may have to transmit the decree to the civil court in New Delhi for execution of its order or decision. One can only imagine the plight of the hapless litigant in such circumstances.

Conclusion

It is painfully clear that a major exercise in rewriting of the Act is essential. Reconsideration must deal with both its objectives and ensure accuracy, clarity and consistency in drafting that is essential in any competent legislative process.

To conclude, on a positive note, one aspires to see that the National Green Tribunal would secure to "We the People of India", "environmental justice" that are enshrined in the Constitutional goals of securing to all its citizens:justice, social, economic and political, as also to attain the objectives of the statute.

25 The Consumer Protection (Amendment) Act, 2002.

Pre-Legislative Consultation - Efforts so for and Reality

Josyula Lakshmi * *& Tejbir Singh Soni* **

Introduction

Laws exist to protect people. Laws are made to safeguard the interests of all and to negate and nullify the effects of hierarchy and authority and to overcome societal discriminations and stratification. According to Emile Durkheim, law serves two purposes, it has a repressive purpose evoking fear of transgressing societal norms and it has a restitutive purpose that ensures restoration of society to its original undisturbed shape in case damage is done to the society cohesiveness. Raison-d'etre for law also stems from societal advancement and thereby its growing differences that have a potency to create troublesome responses from people guided by the advantages and the disadvantages that they tend to get exposed to due to development. To ensure that equality and fairness exists and the differences do not extend to become irrational in society, law plays its part. Various law have been formulated that have the potential to scan through the social reality to intervene towards just and fairness so that everyone is placed on an equal footing.

The necessary edict of any contemporary society is Rule of Law which highlights that no individual is above law and law is superior to all. This premise ensures that there is accountability of all – people and institutions - within the society. Adhering to Montesquieu's theory of separation of power[1] which is based on the premise that there should be clear division of responsibility and concomitant accountability of the three wings of government, one may conjure that rule

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1 Waluchow, Wil. "Constitutionalism." In The Stanford Encyclopedia of Philosophy, edited by Edward N. Zalta, Spring 2014., 2014. http://plato.stanford.edu/archives/spr2014/entries/constitutionalism/.

of law is a significant measure of good governance. One which legislates; the other which executes or administers those legislation and the third one which arbitrates any disputes, the Rule of Law becomes necessary so that none of the wings become superior and usurp the power of other wings. Further to this it also makes sure that a system of 'checks and balances' exists which seeks to halt domination by either of the wings of the government. These systems are considered some of the best means which ensure that there is democratic functioning of the system.

The basis of Rule of Law in India is moral authority. Legislations are considered as a means for ensuring social transformation and creation of just and fair social order. Legislations have the legitimacy and the social authority to ensure fairness for all. During the founding of the Constitution, "there were broad social and political consensus that the only way India could dispense substantive socio-economic justice for its people is not just through planned development, but by an effective transformation of Indian society" and law was to be an instrument of this transformation.

Colonial Legacy and Post- independent Efforts

The premise on which the colonial power was based was "White Man's Burden" to civilize the subjects of the sub-continent. This stemmed from the self-fulfilling prophesy of superiority of the West and the consideration that the subaltern or the natives needed significant interventions before they attained freedom and started functioning independently. This burden percolated into the sphere of legislation and the concomitant institutions established to execute the legislative functions. Hence, most of the legislations that were made during the colonial times had other ulterior motives as well and shed away from bearing any resemblance of understanding of the socio-cultural milieu of the natives.

This section of the paper would analyse the colonial legislations in the sphere of police/public order and land revenue/taxes. The rationality of choosing these legislations out of the whole gamut of legislations was that they were considered foundational for colonial rule i.e. control of subjects and revenue. These two

legislations formed the basis for sustaining colonial power in India. Added to that the legislations (Police Act, 1861 and Land Acquisition Act, 1894) were in vogue for quite a long time in post-independent India.

The first legislation that would be considered in detail is the Police Act of 1861 which was a fallout of the Revolt of 1857 and was considered a significant step by the colonial powers for crushing dissent and any move for institutionalizing self-government.[2] Significant to note is that the same legislation continues to this day despite India gaining independence almost six decades ago. It is ironical that the philosophy of the State has changed from being a repressive colonial state to being a sovereign, democratic, republic yet the archaic, anti-democratic legislations such as the above continue. There had been significant voices raised against the provisions of this Act. The Supreme Court in *Prakash Singh* v. *Union of India* (2006) has flagged the urgency of police reforms but have not yielded any substantial results. The focus has been on ensuring functional autonomy and enhanced police accountability.[3] This is but one classic examples of a legislation which although widely criticised in media and academic circles has not been reformed primarily because of lack of political and administrative will.

The second legislation which would be pointed to is related to land issues which formed the medium of extraction of revenue to sustain the empire. Land issues gained importance for colonial powers primarily as a significant source of tax, i.e. land tax, is collected efficiently and effectively. Acknowledging the shortage of European manpower and their lack of local conditions they encouraged the growth of 'non-cultivating intermediaries' or zamindars.[4] These were the same people who used to collect revenue for Nawabs. The primary function of these parasitic intermediaries was to extract high revenues (Dutt, 1947). The legal

2 Daruwala, Maja; Joshi, G.P.; and Tiwana, Mandeep (2014) Police Act, 1861: Why we need to replace it? Retrieved July 14, 2014, from www.humanrightsinitiative.org/programs/aj/police/papers/advocacy_paper_police_act_1861.pdf

3 Venkatesan, J. "Fiat on Police Reforms Still Remains on Paper." The Hindu. November 1, 2013, http://www.thehindu.com/news/national/fiat-on-police-reforms-still-remains-on-paper/article5302489.ece.

4 Deshpande, R.S. . (2014) Current land policy issues in India. Retrieved July 14, 2014, from www.fao.org/docrep/006/y5026e/y5026e0b.html

and land tenure arrangement that was chosen during that time significantly impacted the credit market that time but used to impact till very recently.

Against a similar backdrop, the Land Acquisition Act, 1894 (LAA) is discussed. The LAA was enacted with the motive of enabling the state to acquire land with the intention of meeting the need of industrialization and assist the promoters of industrialization by helping them procure cheap land in plenty.[5]This Act with its colonial legacy treated natives as "subjects".Further, the provision of the Act that was highly contested was the "principle of eminent domain".[6]As per the principle of eminent domain the State had the power to invoke its institutional superiority and acquire any land 'for broader public good'. This proviso however has been more popular as misused than put to a better public good. All in contravention to the various constitutional provisions like right to life enshrined in Article 21. It even violates the 73rd and 74th Constitutional Amendment Act which institutionalizes local self governance in the country. Ironically these provisions have been used to benefit industries not just during pre-independence times but even post-independence.

The Special Economic Zone Act of 2005 has given primacy to acquisition by misusing the 'principle of eminent domain'.It was due to disconcerting voices of dissent that a new legislation was introduced that came into effect from 1st January 2014 called the "The Right to Fair Compensation And Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013". This bill was kept in public domain for seeking feedback but the scope was limited to people who were literate and had access to internet. The law making process post independent India is being explicitly entrusted with the Parliament. Majority of legislative proposal or what is technically known as Bill can be introduced in either of the two houses of Parliament but there are exceptions like the Money Bill which can only be introduces in the Lower House or Lok Sabha. A bill,

5 "The Saga of Land Acquisition." The Hindu, September 6, 2013. http://www.thehindu.com/features/homes-and-gardens/the-saga-of-land-acquisition/article5100915.ece.

6 "Scrap SEZ Act: Civil Society Groups." The Hindu, February 17, 2007. http://www.thehindu.com/todays-paper/tp-national/scrap-sez-act-civil-society-groups/article1798230.ece.

which is nothing but statute in draft form, can be introduced by the minister or any other member in the case of former it is called as Government bill and in the case of latter it is private member bill. A bill technically goes through several stages before it gets approved by the members of the parliament and ultimately gets the assent of the president and it becomes anAct or law which is enforceable under law.

During the whole process of legislation there was an innovation which was the constitution of Departmentally Related Standing Committees (DRSC's) in 1997. The bill often are referred to these DRSC's and their advice has a persuasive value and is usually considered as advice by the government. Acknowledging the fact that any form of representative democracy functions with the elected members as the pioneers of voice of the people but there have been various evidences where lots of amendments or iterations have been worked out in a law. There are laws like the Indian Penal Code, 1860 which had been revised by the Criminal Law (Amendment) Bill, 2012 and further to that Criminal Law (Amendment) Ordinance 2013 which were worked out during the brutal Delhi gang rape in 2013. Isn't continuous amendments a manifestation of bills and acts a manifestation of the gaps which could have been better envisaged during the initial stages of drafting?

The paper seeks to find out what could be the benefit of having a broader consultation with the people? Does having more democratic law making results in lesser amendments and more realistic policies? However, one caveat which needs to be explicitly mentioned is that we cannot have static laws since any social process is organic and it evolves with time and it may be hard to comprehend the whole situation in advance but it seems that the whole process of law making is more or less the same as during colonial times since now we have elected representatives or bureaucracy who consider themselves as champions of law making and the voice of people at large is unheard.

Need for Pre-legislative Consultation

This section of the paper would focus on the latest trends in the legislative process which are considered more democratic and participative. The demand for the catchphrase "pre-legislative consultation" stems from the limitations of some of the significant legislations that were considered authoritarian for any democratic regime which includes India also. Soon after India gained independence and the "tryst with destiny" speech necessarily highlighted the pursuit for socialistic and democratic pattern of society for India. Preamble to the constitution of India mentions that we "hereby adopt, enact and give to ourselves this constitution".[7]

However, the whole process since the time the democratic state of India came into existence has been driven by certain section of the society and the legislations made has been impacting the lives of all the people alike. The whole process of drafting of constitution was based on the premise that some people,elites, have the skills required for drafting like moderation; technical expertise; rational decision making; better negotiation skills and maintaining confidentiality. The approach mentioned is a 'technocratic' approach against the 'deliberative' approach. However, the contemporary theme is more inclined towards not just democratic constitution but ensuring democratic governance. This would require a sense of ownership and moral claim of participation.[8] Hence deliberation; participation; dissent would be considered sine qua non for any effective democracy.

However what needs deep analysis is whether contemporary process of legislation democratic enough? As Bentham had highlighted that democratic governments "rule in the interest of the governed" is the process of legislation

7 The Constitution of India (2014) Preamble. Retrieved July 14, 2014, From www.Constitution.Org/Cons/India/Preamble.Html

8 Hart, Vivien, (2014) United States Institute of Peace Special Report Democratic Constitution Making. Retrieved July 14, 2014, from www.usip.org/sites/default/files/sr107.pdf

or the laws itself ensuring the interest of the governed?[9] It needs to be probed is that whose voice get heard during making legislations. Is it the legislators or executive in power who game the system. This stands more so for a country like India where we have "first-past-the-post-system" (FPTP System) the shortcomings of which are often reflected in the media.[10] Is the government at power with "FPTP system" responsible to the interest of governed?

De Tocqueville mentioned about "tyranny of the majority"which precisely points out the problems of contemporary democratic regime more so for countries which have 'FPTP system'.[11] The litmus test of any legitimate democratic regime is that it works for the interest of all "individuals" or just for "majority"? It needs to be deliberated that whether there is need for "structural" accountability which is more or less ensured by winning the elections on FPTP system or is there need for "value" accountability.

Acknowledging the fact that we have "bounded rationality" as was mentioned by Simon we cannot expect the process of legislation to be rational or fair. The issue of rationality stems from various forms of limitations that exists during the whole legislative process but more important is the need to ensure fairness. Since all of us have a subjective sense of fairness how do we ensure that the legislators would be drafting policies which are fair for all the governed. Any metaphor of distributive justice has highlighted that self-interest and the interest of one's community may dominate during this process. Precisely for this reason John Rawls mentioned that we need to be in a state of "original position" while we are designing a society. "Original Position" is a state in which a person is in the "veil of ignorance" and is not aware of her/his position

9 Brink, David, "Mill's Moral and Political Philosophy" in The Stanford Encyclopedia of Philosophy, edited by Edward N. Zalta, Fall 2008., 2008. http://plato.stanford.edu/archives/fall2008/entries/mill-moral-political/.

10 S, Rukmini, "How Parliament Would Look with Proportional Representation" The Hindu, May 20, 2014. http://www.thehindu.com/opinion/blogs/blog-datadelve/article6029392.ece.

11 Crittenden, Jack, and Peter Levine, "Civic Education" in The Stanford Encyclopedia of Philosophy, edited by Edward N. Zalta, Summer 2013., 2013. http://plato.stanford.edu/archives/sum2013/entries/civic-education/.

or allegiance.[12] It is like a tabula rasa and when a person in this state is given the authority to design legislations the primary logic that will dominate in her/his mind would be that she/he has to ensure fairness for 'all' and within this 'all' she/he also falls. This unawareness regarding her/his current position and consequent impact of the legislations which she/he designs would seek to ensure fairness for all. It is argued that this sense of fairness would seek to accommodate the views of all especially those of the marginalized sections precisely because the person drafting the law may anticipate that tomorrow he may be one amongst the vulnerable section of the society.

There are voices heard in favour of Proportional Representation System by the opposition especially after election results are announced. Further the whole process of legislation needs to be contextualized since not every legislation impacts all the people in the same manner. Mill has highlighted a caveat which needs to be ensured during policy making he says that people should not be considered a homogenous mass. This is more so for India where there are several socio-economic inequalities prevalent in the society. Apart from that the initial endowments of everyone is not the same and that has a predominant role in enhancing or limiting the capabilities of individuals. The contextualization aspect also stems from Madisonian Rule which highlights that there is need for protection of minorities. Since a generic legislation which sees all as equals would not address the initial endowments there exists need for protection or what is mentioned in the constitution of India as affirmative actions for the welfare of the vulnerable or marginalized groups.

All this calls for the process of legislation to be democratic and in consonance with the hope of the people at large. Political philosopher Rousseau mentioned the need that citizenship requires active public services. This would necessarily entail an active citizenry in the process if political decision making. Often it is witnessed that legislations are drafted in hasty matters and does not take into consideration the voices of all. There are legislations which are made keeping

12 Freeman, Samuel, "Original Position" in The Stanford Encyclopedia of Philosophy, edited by Edward N. Zalta, Spring 2012., 2012. http://plato.stanford.edu/archives/spr2012/entries/original-position/.

the interest of a specific group which is more vocal or sometimes the whole process of legislation is a knee-jerk reaction to any public issue.[13]

Steps Taken Globally and Nationally

This sections intends to highlight the efforts which have been taken globally and locally in the direction of pre-legislative consultation. Internationally there have been efforts to make the whole process more democratic and participative. In 1986 Nicaraguan National Assembly encouraged participation by citizens and there were widespread and constructive feedback received from the whole exercise. On the same lines in 1988 Uganda and Brazilian governments call for inputs for the constitution received an impressive response. Perhaps in this whole exercise the efforts of South African government is considered the best. In 1994, the South African government encouraged the people to provide their meaningful inputs regarding the constitution and the phrase which it used to make a sense of ownership was "You've made your mark, now have your say." The whole process especially in South Africa is an emblem of emancipation since it highlights the transition from oppression of apartheid to a more participative and democratic society.[14]

Further to this there has been efforts at the pre-legislative consultation stage globally say in the form of select committees or ministerial events over approach paper in United Kingdom. In Australia the draft bills, policy documents and even approach papers are widely publicised to elicit feedback. In South Africa the draft bills are placed in public domain for comments further to that even the constitutional amendments are published for comments giving a month's time before introduction.

However in India it is not mandatory for having consultations.[15] The means

13 Nagar, Anirudha, "Laws by the People, for the People" The Hindu, February 24, 2014. http://www.thehindu.com/opinion/op-ed/laws-by-the-people-for-the-people/article5719578.ece.

14 Supra n. 9.

15 PRS Legislative Research. (2014) Public Engagement with the Legislative Process Background Note for the Conference on Effective Legislatures_Public Engagement with the Legislative Process.pdf (application/pdf Object. Retrieved July 14, 2014, from www.prsindia.org/administrator/uploads/general/1370586595.

by which the consultations happen will definitely have a bearing on the whole issue. The medium of consultation adopted in developed countries primarily relying on internet and print media might not yield the desired results in a country like India primarily because of low literacy and internet penetration rates. This would require a tailor made intervention that might yield the desired results in India. In India till very recently often the only space where people get the chance to raise their concerns is the closed doors of committees.

Some of the efforts within the country which could be an example worth emulating is the drafting of Police Law by Kerala State. Apart from the practice of placing the bill on the website of police department and having provision for the citizens to email and flag their suggestions there were broad publicity given to the town hall meeting in the newspapers which were having better penetration locally.

This was an outcome of acknowledging the fact that lobbying of MLA's and tweaking such a sensitive legislation like police could have wide social unrest. As a result there was a select committee formed which had wide participation (19 members); headed by home minister and included MLA's from almost all the political parties. This meeting had "town hall meetings" in all the 14 districts of the state. The committee came up with a suggestion of approximately 790 amendments and these were discussed in the assembly. Out of which almost 240 amendments were incorporated and were based on the feedback of the people at large. The ultimate result was a model Kerala Police Act which has been widely accepted as a participative legislation. This practice of Kerala is considered to be a good practice and could be replicated by other states and central government in India.

Days allotted for submissions on draft Bills	
Draft Bills published in 2009, 2010 and 2011	Days
Model Panchayat and Gram Swaraj Bill, 2009	21
A Model Real Estate (Regulation of Development) Bill, 2009	45

Legal Practitioners Bill, 2010	30
Mines and Minerals (Development and Regulation) Bill, 2010	26
4th Mines & Minerals (Development & Regulation) Bill, 2010	7
Citizens Right to Grievance Redress Bill, 2011	21
Real Estate (Regulation & Development) Bill, 2011	30
Port Regulatory Authority Bill, 2011	39
The National Sports (Development) Bill, 2011	30
Second National Sports (Development) Bill, 2011	15
Land Acquisition and Resettlement & Rehabilitation Bill, 2011	30
Sources: Press Information Bureau of India, PRS.	
Legislative Process.pdf	

In India we find the practice of consultation regarding the drafting the bill in two significant legislations the Right to Information (RTI) Act and the Jan Lokpal Bill where there was significant inputs been provided by the civil society organizations. Some more steps taken in this direction is the call from the Department of Information Technology for consultation regarding the drafting of the draft Electronic Service Delivery Bill, 2011. However, what has been witnessed is that there has been no uniformity in the modus-operandi of the ministries since there were bills which were in public domain like the amended LAA but there were bills like Public Interest Disclosure Bill, 2010 and the Judicial Standards Accountability Bill, 2010.[16] The table here highlights the number of days for which the bills in recent years was kept in public domain for having inputs from the public at large.

16 Ibid.

Conclusion

There have been steps taken to ensure that there are platforms where people raise their voices like the Right to Information Act or the websites which call for feedback regarding any legislation but need exists to broaden and deeper the dialogue by providing wide publicity to these discussions in the line of Kerala Police Act enactment where there were innovations being worked out despite the fact that the literacy rate of the state has been significantly higher than many of the states in India.

Amid the broader discussion of deepening the democracy is the need for ensuring that we just do not replicate the legislative process that dominates globally rather tailor the legislations keeping in mind the socio-cultural milieu of India. It had been suggested by the National Commission to Review the Working of the Constitution (NCRWC) in 2002 that the whole process of pre-legislative consultation should be institutionalized and everyone irrespective of their expertise should have the chance to express their opinions.

Judicial Accountability and Legislative Escapades: A Critical Evaluation of the 2012 Bill

Shivika Choudhary & Sukant Singh Rawat***

Introduction

Quoted in Brihadaranyaka Upanishad, *"Law is the King of Kings; nothing is superior to law. The Law aided by the power of the King enables the weak to prevail over the strong"*[1]

Law is superior to all, this principle is enshrined in Dicey's concept of 'Rule of Law'[2] that is equal protection of law by the State, a concept essential for sustaining democracy. The task of ensuring obedience to Rule of Law is entrusted upon the judiciary which acts as the guardian of rights of the people. In order to fulfil this expectation, judicial independence is considered an essential element[3] and is provided through many safeguards in the Constitution. These safeguards, however, may at times be utilised to escape liability in cases of corruption and impropriety, which has invariably raised concerns of ensuring obedience of law by the guardians themselves. India appears to be one of the few states where a Judge can forego trial by a mere resignation or transfer as in case of misappropriation of funds by Justice Soumetra Sen, failure to institute impeachment proceedings against Justice V. Ramaswami, attempted

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1 Sivananda Swami, Brihadaranyaka Upanishad – Sanskrit Text, English Translation and Commentary 89-14 (Divine Life Society, 1985). See also, Sarvadhikari, History of Hindu India 10 (Tagore Law Lectures, 1880).

2 See generally, A. V. Dicey, Introduction to the Study of Law and Constitution 107-122 (8th ed., 1915) (1885), available at http://files.libertyfund.org/files/1714/0125_Bk.pdf.

3 A.S. Anand, Indian Judiciary: Problems and Prospects, 48 (1) Journal of the Indian Law Institute 556, 557 (2006).

investigation and subsequent transfer of Justice P. D. Dinakaran, and the public furore over hesitation in examining sexual harassment charges against Justice Ganguly.[4] Such impunity to judges may hint to a practise not in consonance with the Rule of Law and raise concerns of placing judges above the law.

While efforts are made to address the impunity through many legislative measures, the recent being the Judicial Standards and Accountability Bill 2012,[5] it is pertinent to examine the efficacy of such measures at ensuring accountability without compromising judicial independence. The Bill, which was approved by the Lok Sabha on March 29, 2012, has been cleared by the Union Cabinet on February 12, 2014 and pending before the Rajya Sabha.[6] As the Rajya Sabha deliberates on this Bill, through this legislative note the authors attempt to examine the Bill and its impact on the judicial system under the heads: (1) Judicial Accountability; (2) Impact on Independence; (3) Investigation of Complaints; (4) Definitional Issues; and (5) Termination of Office.

Judicial Accountability

A reading of the works of Justice H. M. Seervai suggests that the constitution makers were determined to provide for an independent and fearless judiciary, composed of men of unimpeachable integrity and the highest character, apart from acknowledged competence in law.[7] The objective of maintaining integrity of judges has to address two key issues identified by Justice Thomas of the Supreme Court of Queensland: (i) the identification of standard to

4 See generally, Budging judges, The Indian Express, Nov. 12, 2010; Preeti Panwar, Timeline of the Justice AK Ganguly law intern sexual harassment case, One India News, Jan. 6, 2014, available at http://news.oneindia.in/kolkata/timeline-of-the-justice-ak-ganguly-law-intern-sexual-harassment-case-1371729.html.

5 The Judicial Standards and Accountability Bill 2012, Bill No. 136-C of 2010, Passed by Lok Sabha on March 29, 2012 [hereinafter Judicial Accountability Bill 2012].

6 Ruhi Tewari, Cabinet clears amendments to judicial accountability Bill, The Indian Express, Feb. 13, 2014, available at http://indianexpress.com/article/india/politics/cabinet-clears-amendments-to-judicial-accountability-bill/.

7 Justice H. M. Seervai, quoted in S. Sahay, Judicial Accountability: Issues, 45 International Journal of Public Administration 412 (1999).

which members of the judiciary must be held; and (ii) a mechanism, formal or informal, to ensure that these standards are adhered to. [8]

A. Identification of Standards

The need for judicial ethics arises in all democratic constitutions, or even those societies which are not necessarily democratic or not governed by any constitution. The foremost reference to core judicial responsibilities can be found in the oath for the judges of the High Courts and the Supreme Court as provided in the Constitution.[9] The oath obliges a judge to respect highest ethical standards in the following words:

"[T]hat I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill will and that I will uphold the Constitution and the laws."[10]

The Judicial Accountability Bill 2012 lists standards for judges in its Section 3 and Schedule. In doing so, it echoes values and ethics laid down previously through various instruments, viz., the United Nations' Basic Principles on the Independence of the Judiciary 1985;[11] the Restatement of Values of Judicial Life 1997;[12] Beijing Basic Principles on the Independence of the Judiciary 1985; the Bangalore Principles of Judicial Conduct 2002;[13] the Cairo Declaration on

8 R. C. Lahoti, Canons of Judicial Ethics 12 (2005)

9 Constitution of India, Schedule III.

10 Ibid.

11 Basic Principles on the Independence of the Judiciary 1985, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx.

12 Restatement of Values of Judicial Life 1997, adopted May 7, 1997, available at http://bharatiyas.in/cjarold/files/restatement_of_values_jud_life.pdf.

13 The Bangalore Principles of Judicial Conduct 2002, available at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

Judicial Independence 2003;[14] and the Suva Statement on Principles of Judicial Independence and Access to Justice 2004. These declarations and statements discuss principles of independence, impartiality, integrity, propriety, equality and competence.

Taking note of the allegations of misconduct against the judiciary that prompted even the Supreme Court to comment on the 'uncle judge' syndrome in the Allahabad High Court, the Judicial Accountability Bill 2012 is appreciable for including provisions that bar such a practice thereby ensuring propriety, impartiality and integrity. Section 3 enlists Judicial standards to be followed by the judges that prevent a judge: to "have close association or close social interaction with individual members of the Bar"[15]; to permit any member if his family, who is also a member of the Bar, "to appear before him"[16], "to use the residence in which the Judge actually resides or use other facilities…for professional work of such member"[17]; and "to hear and decide a matter in which a member of his family, or his close relative or a friend is concerned."[18] Considering propriety and independence, the Bill purports to prevent the judges from accepting "gifts or hospitality"[19]; "engage, directly or indirectly, in trade or business"[20], "trading in securities"[21] or "seek any financial benefit"[22]. The Bill also dissuades a judge from having bias in his judicial work or judgments[23] and from contesting elections.[24]

14 The Cairo Declaration on Judicial Independence 2003, available at http://www. multaqa.org/pdfs/CairoDeclaration.pdf.

15 The Judicial Accountability Bill 2012, Supra n. 5, S. 3(2) (b).

16 Ibid at S. 3(2) (c).

17 Ibid at S. 3(2) (d).

18 Ibid at S. 3(2) (e).

19 Ibid at S. 3(2) (i).

20 Ibid at S. 3(2) (l).

21 Ibid at S. 3(2) (k).

22 Ibid at S. 3(2) (m).

23 Ibid at S. 3(2) (o).

24 Ibid at S. 3(2) (a).

B. Mechanism to Ensure Standards

In ancient India, obedience to judicial ethics and dispersion of justice has been regarded as the dharma of Judges evident from a verse of the Manusmriti:

"In a case where Dharma (justice) has been injured or made to suffer at the hands of Adharma (injustice) and still the judges fail to remove the injustice, such judges are sure to suffer for their act (or omission) which is Adharma."[25]

Thus, a judge was liable to be punished for any wrong decision taken by him as it amounted to violation of law (Adharma). In modern India, judicial accountability can be traced to the wording in Article 14 that the State 'shall not deny to any person the equal protection of the laws,' thereby placing a duty on the state to deliver the promise of the law. The Supreme Court has lent strength, through its holding in *Budhan Choudhary*[26] and *A.R. Antulay*,[27] that judiciary is 'State' for the purpose of constitutional limitations on power. Further, the definition of public servant in section 21 of the Indian Penal Code, 1860 covers the judges. The pronouncement of the Supreme Court in *Budhan Choudhary*[28] is also salutary for observing that any collusion or fraud on the court to procure a miscarriage of justice would be seriously noticed by the court is indeed salutary. Although it was so held in context of property rights, the principles would have to be automatically applicable to every right. A resulting argument is that Articles 32 and 226 should be brought into action to address any bias or impropriety by the judges. Tragically, however, the procedural hurdles placed by the British established judicial system have been permitted to continue largely through non-application of mind to the parity of power principles ingrained in Article 14, thereby

25 Manu, Manusmriti- English S. B. E., Manu VIII: 12-14 (F. Maxmuller ed., Motilal Banarsidas, 1967) [hereinafter Manusmriti], quoted in M. Rama Jois, Legal and Constitutional History of India – Ancient Legal, Judicial And Constitutional System 18 (Universal Law Publishing, 1984).

26 Budhan Choudhary v. State of Bihar, (1955) 1 SCR 1045, 1049.

27 A. R. Antulay v. R. S. Nayak, (1988) 2 SCC 602.

28 Bhaurao Dagdu Paralkar v. State of Maharashtra, (2005) 7 SCC 605.

destroying the substance thereof. [29] The primary such hurdle is the immunity and protection granted to judges under Judges Protection Act 1985 and Judicial Officers Protection Act 1860. It is, however, submitted that these Acts grant limited immunity which provides protection for anything done when 'acting or purporting to act in the discharge of his official or judicial duty or function'[30] or 'in good faith'[31]. Further, by virtue of Article 124 (4) an erring judge could only be impeached on grounds of proven misbehaviour or incapacity. Article 124 (5) placed duty on the Parliament to lay the law to regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge. Pursuant to this provision, the Parliament enacted the Judicial (Inquiry) Act 1968 which provides a detailed procedure for investigating and establishing 'misbehaviour' or 'incapacity' of the Judge by a Committee of Inquiry to be constituted by the Speaker of Lok Sabha or Chairman of Rajya Sabha. In response to the enactment, the Supreme Court limited the right of public to file a complaint against erring judges in its pronouncement of *K. Veeraswami* v. *Union of India*[32] by placing mandatory requirement of prior assent of Chief Justice prior to filing an FIR against an erring judge.

Another issue is that any such misbehaviour or incapacity may result in institution of impeachment proceedings, the possibility of which is grossly reduced by virtue of the wording of Article 124 (4), 'in office'.[33] The Authors use the word 'may' as until now, none of the judges alleged of gross misappropriation or impropriety have been impeached except Justice Soumitra Sen of Calcutta High Court who was impeached by the Rajya Sabha.[34] While the Lok Sabha

29 T. Devidas & Hem Lall Bhandari, Judicial Accountability, 48 (1) Journal of the Indian Law Institute 94, 98 (2006).

30 The Judges (Protection) Act, 1985, S. 3.

31 The Judicial Officers Protection Act, 1860, S. 1.

32 1991 SCC (3) 655.

33 Constitution of India, Article 124(4).

34 TNN, Justice Soumitra Sen impeached by Rajya Sabha on corruption charges, Times of India, Aug. 18, 2011, available at http://timesofindia.indiatimes.com/india/Justice-Soumitra-Sen-impeached-by-Rajya-Sabha-on-corruption-charges/articleshow/9649995.cms.

was yet to approve impeachment, Sen used the age old trick of 'resignation' to escape the same as Article 124 (4) provides for impeachment 'in office'.[35] Alternatively, judges facing such charges may get transferred as happened in the case of Justice Dinakaran, the then Chief Justice of Karnataka High Court. Pursuant to complaint of 76 members of Parliament, the Rajya Sabha Chairman admitted charges against him and instituted a three member panel to examine the charges.[36] While the investigation ensued, Justice Dinakaran was not promoted to Supreme Court, rather transferred to Sikkim High Court. The transfer evidenced the 'helplessness that the government and the collegiums face in disciplining judges' and invited severe condemnation by the Sikkim Bar Association.[37] This was followed by Justice Dinakaran's expected resignation, his continuous impediment to investigation and the unexpected request for withdrawal of resignation.[38] The response to an RTI by the Department of Justice surprisingly revealed that pursuant to Article 221, both, Sen and Dinakaran, JJ. would continue to enjoy their post-retirement benefits even though they resigned ahead of impeachment proceedings as there was no Constitutional or statutory provision to restrict their entitlements.[39]

The present Bill, which would replace the Judicial (Inquiry) Act 1968, attempts to address these concerns by instituting a complaint mechanism under Chapter IV; providing detailed investigation procedure by the Scrutiny Panel and the Oversight Committee;[40] and enabling removal of a Judge upon Presidential

35 Constitution of India, Article 124(4).

36 Process to impeach Karnataka chief justice PD Dinakaran begins, DNA, Jan. 18, 2010, available at http://www.dnaindia.com/india/report-process-to-impeach-karnataka-chief-justice-pd-dinakaran-begins-1336011.

37 Maya Sharma & A Vaidyanathan, Justice Dinakaran's transfer to Sikkim causes anger, NDTV, Apr. 9, 2010, available at http://www.ndtv.com/article/india/justice-dinakaran-s-transfer-to-sikkim-causes-anger-19539.

38 PTI, Justice Dinakaran wants to withdraw resignation, Times of India, Aug. 11, 2011, available at http://timesofindia.indiatimes.com/india/Justice-Dinakaran-wants-to-withdraw-resignation/articleshow/9569118.cms.

39 Perks for judges despite premature retirement, Zee News, Jan. 15, 2012, available at http://zeenews.india.com/news/nation/perks-for-judges-despite-premature-retirement_752763.html.

40 The Judicial Accountability Bill 2012, Supra n. 5, Sections 10-21. Refer Infra n. 51-60.

recommendation.[41] The Authors would discuss these mechanisms in the following sections. The Bill has also introduced mechanisms for reprimanding erring judges by empowering the oversight Committee to issue advisories or warnings when only some of the charges have been proved against the judge.[42]

An Infringement of Judicial Independence?

While addressing inaugural lecture of the M. C. Setalvad Memorial Lectures, the then Chief Justice of India, Justice R. C. Lahoti commented on the need for a competent, independent and impartial judiciary as an institution:

"It will not be an exaggeration to say that in modern times the availability of such judiciary is synonymous with the existence of civilization in society."[43]

Since the inception of the doctrine of Basic Structure in *Keshavananda*[44] features like supremacy of the Constitution[45], the principle of separation of powers[46] and independence of judiciary[47] have been acknowledged as 'basic'. By virtue of these pronouncements, any provision of a legislation which endangers the independence of judiciary cannot be rendered constitutionally valid by causing amendments to the Constitution of India. Invariably, these concerns echo against the Judicial Accountability Bill 2012.

As far as the standards of judicial conduct is concerned, some legal luminaries believe that statutory laying down of judicial standards by the Parliament,

41 Ibid at Chapter VII. Refer Infra n. 65-74.

42 Ibid at S 34 (1) (b). Refer Infra n. 51-53.

43 R. C. Lahoti, Supra n. 8, at 13.

44 Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461 [hereinafter Keshavananda Bharati].

45 State of Rajasthan v. Union of India, AIR 1977 SC 1361.

46 Keshavananda Bharati, Supra note 44, SIKRI, C.J.; Bommai, S.R. v. Union of India, (1994) 3 SCC 1; State of Bihar v. Bal Mukund Shah, (2000) 4 SCC 640 (Supreme Court Of India); I.R. Coelho v. State of T.N., (2007) 2 SCC 1 (Supreme Court Of India); Minerva Mills v. Union of India, AIR 1980 SC 1789 (Supreme Court Of India).

47 Kumar Padma Prasad v. Union of India, (1992) 2 SCC 428, 456.

regardless of its content, makes a dent in the judicial independence.[48] This concern does not, however, in the view of the authors, seem to be well-founded; this is so because of the fact that the judicial standards laid down in the Bill has been imported from the Restatement of Values of Judicial Life,[49] that is, those standards of conduct which the judiciary imposed upon itself on its own accord, and the Parliament just gave a statutory recognition to those values. Thus, the statutory laying down of judicial standards by the Parliament does not amount, in this case, to imposition of standards by the Parliament over the judiciary.[50] A perusal of the language of the relevant provision leads to the conclusion that the standards of judicial conduct are just inclusive in nature and not exhaustive. It is, therefore, submitted that any other desirable standard of judicial conduct, which the Parliament may have missed on, may very well be supplied to by appropriate construction, as and when required.

There is a grave apprehension against the provision in the Bill, whereby the Oversight Committee can issue advisories or warnings to an incumbent judge in a case wherein all or any of the charges levelled against a judge have been proved, but the Oversight Committee is of the opinion that the charges proved do not warrant removal of the Judge.[51] It is quite disquieting that a seated judge is publically reprimanded in the form of "advisories or warnings" and then allowed to continue as a judge. Such a measure would inevitably lead to a loss of public trust and confidence in the judiciary, which is one of the most important tenets of judicial independence. Moreover, the fact that such "advisories or warnings" would be issued by an extra-constitutional body further leads to grave constitutional anomaly which the Bill suffers from.[52] Even the Hon'ble Supreme Court in one of his judgments has held that there

48 The Judicial Accountability Bill, 2012, Supra n. 5, S 3.

49 Supra n. 12.

50 V.R. Krishna Iyer, J., Judicial Accountability to the Community: A Democratic Necessity, 26(30) Economic and Political Weekly 1808, 1810 (July 1996).

51 The Judicial Accountability Bill, 2012, Supra n. 5, S 34 (1) (b).

52 Supreme Court Advocates-on-Record Association and another v. Union of India, AIR 1994 SC 268: "The constitutional provisions conceives, as it does, plurality and mutuality, but only amongst the constitutional functionaries and not at all in the extra-constitutional ones."

are certain instances of misconduct which, although are not grave enough to warrant removal of the judge, should not go unnoticed; in such cases, the Supreme Court has suggested that it is the judicial self-restraint alone which should prevail as a remedy in such a situation.[53]

Another provision of the Bill which seems to be somewhat menacing to the judicial independence is one which lays down the constitution of the "Oversight Committee". Under the provisions of the Bill, the Oversight Committee shall, inter alia, consist of the Attorney-General for India to be ex officio Member.[54] The Attorney-General for India has a duty as well as a right to represent the Government of India before all the courts in the territory of India, whenever doing so is required.[55] Now, the possibility that the Attorney-General for India will have to appear before a judge, a complaint against whom is under consideration before the "Oversight Committee", is not a distant one.[56] This makes a grave dent in the notion of judicial independence because such a judge cannot be expected to act impartially in a case wherein the Attorney-General for India appears.[57] It is also to be noted that Attorney-General is not an independent constitutional functionary, but one who shares a lawyer-client relationship with the Union Government.[58] Now, Government bodies are the biggest litigant in the country,[59] being so it is quite ironical that the attorney/lawyer of the Union Government sits in the Committee which decides the fate of judges before whom those cases are pending in which the Union Government is a party. The authors, therefore, submit that the some of the concerns regarding judicial independence may be relevant for consideration prior to passing of the Bill by the Rajya Sabha.

53 C. Ravichandran Iyer v. Justice A.M. Bhattacharjee & Ors, 1995 SCC (5) 457.

54 The Judicial Accountability Bill, 2012, Supra n. 5, S. 18(1)(d).

55 Constitution of India, Article. 76(3).

56 Unless the judge is not deprived of any judicial work in pursuance of the recommendations under Section 33 of the Bill.

57 Ajit Prakash Shah, J, Judicial Standards & Accountability Bill, The Hindu, available at http://www.thehindu.com/opinion/lead/judicial-standards-accountability-bill/article1582573.ece.

58 B.P. Singhal v. Union of India (UOI) and Anr., (2010) 6 SCC 33.

59 Delhi Development Authority v. Shree Durga Construction Co., MANU/DE/1849/2010.

Investigation of Complaints

One of the grounds on which the framework for investigation proposed by the Bill can be criticised is the constitution of the "Oversight Committee" and the "Scrutiny Panel". Starting with the constitution of the oversight committee, the problem attached with the inclusion of the Attorney-General for India as a member of the oversight committee has already been discussed earlier in the article. The inclusion of an "eminent person" in the oversight committee is another questionable facet of the Bill. The hitch involved in the said provision is that it does not lay down any particular set of qualifications for a person who can be inducted into the oversight committee. Such being the case there is a room for the incumbent government to resort to arbitrariness in the appointment of such an "eminent" member and a person may be appointed as a member of the committee in this category, even though he may not be "eminent" in the proper sense of the term.

Proviso to Section 18(1) of the Bill provides that in case of an allegation against a judge who happens to be a member of the Oversight Committee, the Chief Justice of India shall replace him with another Judge of the Supreme Court; however, the legislators failed to see the need of a same provision in respect of the Scrutiny Panel. Therefore, even if a complaint has been made against a judge, who happens to be a member of the scrutiny panel, he can, theoretically, participate in the scrutiny of a complaint made against himself, which would be a grave violation of the rule of natural justice, that is "Nemo judex in causa sua", and that such a conduct on a part of a judge would then be arbitrary and hence hit by Article 14 of the Constitution of India.[60]

The Bill fails to lay down a time-bound procedure for the disposal of the complaint made against a judge under the Bill. Doing so means that the judge may be pestered with the ongoing inquiry or investigation for an indefinite period. Laying down a time-bound inquiry/investigation procedure is highly advisable, especially in the light of the fact that under the Bill, "any person" can file a complaint against the judges, which will lead to a plethora of complaints

60 State of U.P. and Anr. v. R.S. Gupta, 2002 (3) ACR 2345.

against the judges. Such complaints, if not disposed off within a reasonable time, will lead to the piling up of such complaints.

The most prominent flaw in the Bill, according to the authors, happens to be etched in Section 41 of the Bill. Section 41 of the Bill provides that once the scrutiny of complaints under the proposed Act has commenced, such allegations as are the subject-matter of the inquiry or investigation shall not be subjected to any action for contempt of court. It is highly doubtful as to whether doing so is valid under the provisions of the Constitution of India. The Hon'ble Supreme Court of India in a landmark case has held that since the jurisdiction of the Supreme Court to take cognisance of an act of contempt is constitutional, the same cannot be controlled by any statute.[61] Viewing Section 41 in the light of the ratio laid down in the above mentioned case leads to the conclusion that since Section 41 of the Bill seeks to fence the contempt jurisdiction of the Supreme Court of India, it is per se unconstitutional and therefore, void. Also, Section 53 of the Bill, presents a constitutional anomaly; once it is proved that the complaint is frivolous or vexatious in nature, it should be treated as contempt simpliciter and should be under the sole jurisdiction of the Supreme Court or the High Court, as the case maybe; but the stated Section charges the Oversight Committee, an extra-constitutional body, to deal with such complaints and to impose punishment therein. Thus, Section 41 read with Section 53 of the Bill indicates that on the one hand, the domain of the Supreme Court is fenced, and on the other, it is encroached upon by the Oversight Committee. This not only endangers judicial independence, it is also constitutionally invalid. The Proviso to Article 368(2) clearly lays down that any change in Chapter IV of Part V (those dealing with "The Union Judiciary") and Chapter V of Part VI (those dealing with "The High Courts in the States"), shall require, in addition to the special majority, ratification by at least one half of the State Legislatures. However, although Sections 41 and 53 of the Bill seeks to make stealthy alterations to the provisions contained in Articles 129 and 215, no constitutional amendment has been proposed to this effect.

61 *In Re* Vinay Chandra Mishra, 1995 AIR 2348 SC; Pritam Pal v. High Court of Madhya Pradesh, (1992) AIR 904; *In Re* Ajay Kumar Pandey, AIR 1997 SC 260.

Definitional Issues

Another constitutional hindrance in the path of the Bill is that it seeks to define the word "misbehaviour" under Section 2(j) of the Bill. The definition is exhaustive in nature; this fact is amply clear by the fact that the relevant clause uses the word "means" before enumerating all the acts which would constitute "misbehaviour" within the provisions of the Bill.[62] Also, the lack of an inclusive clause at the end of the clause further supports the conclusion that the clause is couched in exhaustive words.[63] The Supreme Court of India has endorsed the view that the framers of the Constitution intentionally left the word "misbehaviour" undefined so as to make the provision an elastic one, capable of being defined according to the circumstances of each case.[64] Therefore, such straight-jacketing of a word used in the Constitution, by statutorily defining it in exhaustive terms amounts to a damage to the fabric of the Constitution and a disguised amendment to the Constitution without effecting the requisite amendment to the Constitution of India.

Termination of Office

The concept of accountability requires appropriate procedure and punishment, as has been noted by the Supreme Court that transfer cannot be considered punishment as was in case of Justice Dinakaran.[65] The Bill, therefore, provides that the Oversight Committee may recommend the Central Government for prosecution of the judge when it is satisfied of prima facie commission of any offence,[66] and in case of such judge having demitted office, the Committee may recommend the matter to Central Government if it is of the opinion that

62 P. Kasilingam v. P.S.G. College of Technology (1995) Supp 2 SCC 348, wherein the Court held that the use of the word `means' in a definition indicates that the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition.

63 Babubhai Prabhudas v. P.C. Adelaji Kaluji And Anr, (1969) 10 GLR 676.

64 C. Ravichandran Iyer v. Justice A.M. Bhattacharjee & Ors, 1995 SCC (5) 457.

65 Supra n. 6, 36-39.

66 The Judicial Accountability Bill, 2012, Supra n. 5, S. 34 (2).

the misbehaviour is serious in nature.[67] By entrusting the power of proceeding with prosecution upon the Parliament, these provisions add a political element to the investigation, rather than placing it on judicial merits. The Committee may alternatively issue advisories or warnings when only some charges are proved.[68] As discussed earlier, this provision acts as a double-edged sword.[69]

The Bill also empowers the Committee to make reference to the President for initiating impeachment proceedings.[70] The option of the judge to appeal to the Supreme Court against an order of removal has been recognized by the Law Commission in its 195th report.[71] This particular recommendation seems to be reasonable because when a particular law is involved, on the basis of which a judge has been removed, there may be an interpretational error by the Parliament or by the "Oversight Committee" and the judge should have a right to get that error rectified. This right was recognised by the Supreme Court in the *Justice Veeraswami's case*.[72] This particular rule does not find any place in the Bill.

Alarmingly, the Bill continues to harbour under the notion that resignation is an appropriate means of punishment by stating that 'the Oversight Committee... shall request the judge to voluntarily resign and if it fails to do so, then advise the President to proceed for the removal of the Judge.'[73] Thus, refraining from resignation is a condition precedent for moving with the request for removal. The authors submit that such a condition echoes the earlier escape route of resignation utilised by judges.[74]

67 Ibid at S 34 (3).

68 Ibid at S 34 (1) (b).

69 Refer Supra n. 42, 51-53.

70 The Judicial Accountability Bill, 2012, Supra n. 5, S. 35.

71 Law Commission of India (195th Report), The Judges (Inquiry) Bill, 2005 (2006).

72 Mrs. Sarojini Ramaswami v. Union of India and others, AIR 1992 SC 2219.

73 The Judicial Accountability Bill, 2012, Supra n. 5, S. 35.

74 Supra n. 33-39.

Conclusion

The unfortunate aspect of the statute, however, is not its conclusions- it is the handwringing required to settle upon them. The legislature ignored available, clearly defined phraseology, and this has possibly led to an outcome outside of the legislature's original intent. The history of judicial grabbling with accountability standards begs for a level of clarity absent from the statute. Taking into consideration the above mentioned defects and anomalies in the Bill, it would be a rational conclusion that the Bill needs some modifications and mending. First of all, the provision which empowers the Oversight Committee to issue advisories or warnings to an incumbent judge should be done away with for the reasons which have been stated earlier in the article.[75] Secondly, someone other than the Attorney-General should be the ex-officio member of the Committee,[76] Lokpal may preferably be designated as the ex-officio member of the Committee; doing so would be more in tune with the recent wave of changes made in the body politic of the country. Also, defining the expression "eminent person" would be a welcome change in the Bill, and would go a long way in ensuring that persons of high merit and equanimity adjudicate the complaints against the judges of the constitutional courts. Laying down a time-bound procedure for the disposal of the complaints under the Bill, giving an inclusive definition to the term "misbehaviour" defined in Section 2(j) of the Bill,[77] inserting a provision similar to that laid down in the Proviso to Section 18(1) of the Bill in respect of Scrutiny panel as well.

In addition to the modifications in the provisions of the Bill, another thing which is desirable at this juncture is to carry out the requisite constitutional amendments so that the Bill is constitutionally valid. It is understandable that if a complaint against a particular judge is allowed to be taken as an act of contempt, the very motive of the Bill will be defeated. However, Article 129 and Article 215 of the Constitution of India should be amended so

75 Supra n. 42, 51-53, 68-69.

76 Supra n. 54-59.

77 Supra n. 62-64.

as to remove the constitutional eclipse over the relevant provisions in the Bill. Most importantly, the Bill should balance its provisions to respect judicial independence.[78]

78 Supra n. 43-59.

Outsourcing Wombs: Exploring The Ethical And Legal Issues In Surrogacy

*Harman Shergill**

Introduction

Nature has bestowed women with the beautiful capacity to procreate a life within themselves and every woman cherishes the experience of motherhood. Unfortunately, some women due to certain physiological conditions are unable to give birth to their own off-spring. The desire for motherhood leads them to search for alternative solutions, and surrogacy presents itself as the most viable alternative.

The very word 'surrogate' means 'substitute'.[1] It means that a surrogate mother is a substitute for the genetic-biological mother. In simple words, a surrogate mother is a woman who is hired to bear a child, which she hands over to her employer at birth. When it comes to surrogacy, there are two types: "traditional" and "gestational".

Traditional surrogacy is done via artificial insemination, with the surrogate using her own egg and another man's sperm. Gestational surrogacy is done via In Vitro Fertilization (IVF), where fertilized eggs from another woman are implanted into the surrogate's uterus. Choosing which route to take is one of the most important and earliest decisions a surrogate and the intended parents will have to make with each having its advantages and the downside.

Social, economic and political", as also to attain the objectives of the statute. In 2008 The New York Times published an article that claimed India is engaging

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1 Malini Karkal, Surrogacy from a feminist perspective, Indian Journal of Medical Science (IJME), Oct.- Dec. (1997), http//www. Issuesinmedicalethics.org/054mi15.html; Nelson James Lindemann, Cutting motherhood in two : some suspicions concerning surrogacy in Feminist Perspectives In Medical Ethics (Holmes Helen Bequaert, Purdy Laura eds., 1992).

in the "rapidly expanding business" of outsourcing reproduction in which specialised clinics provide surrogates for foreigners, most of which are from the United States of America or Europe.[2] After business process, knowledge process and legal process outsourcing, genetic pool banks of India are the latest outsourcing industry from India. The practice of 'renting a womb' and getting a child is similar to outsourcing pregnancy. The volume of this 'trade in babies' is estimated to be around $ 500 million and the numbers of cases of surrogacy are increasing rapidly. Cheap medical facilities, advanced reproductive technological know-how, coupled with poor socio-economic conditions, and a lack of regulatory laws in India in this regard combine to make India an attractive option.

The most salient concern in a surrogacy arrangement, inter-alia, is that the child articulated in a surrogacy contract does not exist "at the time the agreement is struck."[3] Although parents would never concede to imagining children as economic objects, we are now presented with a 'market for babies' in which "specialised providers" contribute greatly to global economies by encouraging women to both exploit and be exploited.[4] The profit-driven concerns of capitalist markets succeed in objectifying women and their reproductive capacity at the expense of women's rights. Commercial surrogacy and commercial ova donation are banned in a number of countries. Such bans, combined with the difficulty in locating altruistic surrogates and ova donors, are fuelling the cross-border 'trade in babies'.Since legalizing commercial surrogacy in 2002, India has become an important hub of commercial surrogacy and ova donation, able to offer services at a significantly lower cost and advertising a plentiful supply of surrogates and donors. Ethnographic work in Indian surrogacy clinics and Indian civil society groups raises concerns about the conditions under which

2 S Sinclair, India Nurtures Business of Surrogate Motherhood, New York Times, 10 March 2008, available at http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html

3 Ml. Shanley, Surrogate Mothering' And Women's Freedom: A Critique Of Contracts For Human Reproduction, In Expecting Trouble: Surrogacy, Fetal Abuse, & New Reproductive Technologies, 160 (P Boling Ed., 1995).

4 Dl Spar, The Baby Business: How Money, Science, and Politics drive the Commerce of Conception, Xi (2006).

commercial surrogacy and ova donation is undertaken.[5] The research notes that the women preferred by clinics for surrogacy and ova donation are poor and illiterate, and are portrayed as having clear economic motives for undertaking surrogacy without emotional complications. In a study conducted with 42 surrogates in Anand in India in 2006-2008,[6] the median family income of the surrogates was reported at US $60 per month, meaning that 34 of the 42 women were below the poverty line.[7]

These researchers and activists question whether women in such dire financial need are free to make choices about the risks they undertake in ova donation or pregnancy. The amounts of money involved for surrogates are significant in local terms--they are paid approximately 300,000 Rupees (US $7,500)--around one-third of the fees paid by contracting parents. Such commercial inducements may entice women to disregard the risks involved and face pressure from their family to be involved.[8] A number of surrogates report having no contracts and no third party legal representation.[9] While they receive medical care for the term of their surrogate pregnancies, this is not offered for any of their own subsequent pregnancies, despite the increased risks to their health. Similar concerns are raised as regards commercial ova donation in developing countries, and whether women donors are fully informed of the risks involved or whether financial inducements encourage them to overlook the risks, including the possible over-stimulation of their ovaries to maximise egg production. In response to concerns over surrogacy conditions in India, the Assisted Reproductive Technologies (Regulation) Bill 2010, awaiting approval by the

5 A. Pande, Commercial Surrogate Mothering in India: Nine Months of Labor? PhD thesis, Amherst: University of Massachusetts (2009); K. Vora, Selling Potential: Surplus Fertility And Biocapital In The Production Of Transnational Indian Surrogacy, Paper presented at American Anthropological Association 107th Annual Meeting. San Francisco, 19-23 November 2008; A. Pande, Commercial Surrogacy in India: manufacturing a perfect mother-worker, 35(4) Journal of Women in Culture and Society 969-94 (2009).

6 Ibid.

7 Andrea Whittaker, Cross-border assisted reproduction care in Asia: implications for access, equity and regulations, www.freelibrary.com

8 A. Pande, Commercial Surrogate Mothering in India: Nine Months of Labor?, PhD thesis, Amherst: University of Massachusetts (2009); Supra n. 5.

9 Supra n. 5.

Law Ministry at this writing, contains some protections for surrogates. It sets an upper age limit for surrogates at 35, allows no more than five live births, limits the number of times a woman can undergo embryo transfer for the same couple, and forbids clinics from sending Indian women abroad to act as surrogates. Importantly, it will also make surrogacy contracts legally enforceable. The Bill is discussed in detail in the later part of this paper. Nevertheless, India will continue to have one of the most permissive laws on surrogacy in the world.[10]

Traditionally, surrogacy was sought by infertile heterosexual couples, but now is increasingly sought by gay couples, particularly men, as a way of having children that are biologically related to one parent.[11] The concept of surrogacy itself is not new; indeed, surrogacy scholars are fond of making references to biblical stories of partial surrogacy.[12] The reference to Surrogacy can also be found in the ancient Hindu texts.[13] Transnational gestational surrogacy operations are relatively recent phenomena, however, and are becoming increasingly common, particularly in India.[14] The decision to go abroad for these reproductive services

10 I. Qadeer, Benefits and threats of international trade in health: a case of surrogacy in India, 10 Global Social Policy 303-05 (2010).

11 See, e.g., Susan Donaldson James, More Gay Men Choose Surrogacy to Having Children, ABC NEWS, Mar. 12, 2008, http:// abcnews.go.com/Entertainment/OnCall/story?id=4439567&page=1.

12 See, Usha Rengachary Smerdon, Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India, 39 Cumb. L. Rev. 16 (2008) (citing the Old Testament stories about the impregnation of Hagar, Sarah's maid, by Abraham, and of Bilhah, Rachel's maid, by Jacob); Jennifer Rimm, Booming Baby Business: Regulating Commercial Surrogacy in India, 30 U. PA. J. Int'l L. 1429, 1437 (2009).

13 See, Sonia Dutt Sharma, Surrogacy- Blessing of Motherhood or Curse to Motherhood, 11(1) Indian Journal of Research, (2012).

14 See, Anne Donchin, Reproductive Tourism and the Quest for Global Gender Justice, 24 Bioethics 327 (2010) ; Ruby L. Lee, New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation, 20 Hastings Women's L.J. 275, 276-77, 284 (2009); Amelia Gentleman, India Nurtures Business of Surrogate Motherhood, N.Y. Times, Mar. 4, 2008, at A9 (noting that while exact statistics are difficult to find, "anecdotal evidence suggests a sharp increase" in out-of-country surrogate usage, particularly from India, which tend to be less expensive than surrogacy services in, for example, the United States).

often is triggered by substantive differences in national laws.[15] For example, surrogacy is prohibited in several European countries, even as a remedy for infertility,[16] and is permitted but carefully regulated in other countries, including parts of the United States.[17]

India's surrogacy industry has received perhaps the most attention.[18] The surrogacy process in India is reportedly less expensive than in Canada or the United States, and the industry is largely unregulated.[19] According to research conducted by US journalists on one Indian clinic, a surrogate pregnancy in India costs approximately US$12,000 (of which the surrogate mother may earn between US$5000 and US$7000 for her services[20], as opposed to costs of up to US$80,000 for the same services in the United States.[21]

The trend toward surrogacy globalization and, in particular, toward surrogacy tourism in a few favorable--and inexpensive--parts of the world, has raised concerns about the need to develop and implement measures on a global level to ensure that there is no exploitation.[22] Presently, however, no surrogacy-specific international instrument or regulatory scheme exists.

15 Ruby L. Lee, Ibid.

16 See Margaret Ryznar, International Commercial Surrogacy and Its Parties, 43 J. Marshall L. Rev. 1009, 1016 (2010).

17 Supra n. 12 at 24-26.

18 Supra n. 16.

19 Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, 36 Feminist Stud. 292, 295 (2010). To date, the Assisted Reproductive Technologies Regulation Bill, which would provide standards for the surrogacy industry and make surrogacy contracts binding and enforceable, has not yet been enacted into law.

20 Supra n. 12 at 23-27.

21 See, Journey to Parenthood, Oprah Winfrey Show (Jan. 1, 2006), http://www.oprah.com/world/Wombs-for-Rent.

22 Kristiana Brugger, International Law in the Gestational Surrogacy Debate, 35 Int'l Fordham Law Journal 665 (2012).

Ethical Issues

The human body is the vessel in which a person navigates through his or her life. As such, it is commonly viewed in the legal context as deserving of special care and protection, particularly with regard to the circumstances in which it may be bought, sold, or rented.[23]

Like any other market, the assisted reproductive technology(ART) market also deploys common strategies to generate demand, such as offering packages, schemes, and concessions; inflating success rates; and undertaking aggressive advertising through the use of attractively designed websites, brochures, wall advertisements, street hoardings, bus stop signs, and announcements on local television channels.[24] The industry is functioning through actors and collaborations at various levels, in an environment where the lack of binding standards or regulation is giving rise to medical malpractice and ethical concerns.[25]

Women, who undertake these assignments in India, usually come from lower class to lower middle class backgrounds, are married, and are often in need of money. Their need for money is so acute that more than often, childless couples can negotiate a better price as a result of competition. The system certainly lends itself to the criticism that foreign women unwilling or unable to pay high Western fees happily exploit poor women at a tenth of the price it would cost back home. The system also avoids the legal red tape and ill-defined surrogacy laws women face in the U.S. (Not to mention that India, unlike some developing countries, has a fairly advanced medical system and doctors who

23 See Cynthia B. Cohen, Selling Bits and Pieces of Humans to Make Babies: The Gift of the Magi Revisited, 24 J. Med. & Phil. 288, 291 (1999) ("We have no ethical qualms about selling other materials and procedures that are designed to save lives, such as respirators, oxygen tanks, intensive care services, and transplant surgery. The reason we are reluctant to exchange money for human kidneys is that this would deny something distinctly valuable about human beings--their human dignity and worth.").

24 Nadimpally Sarojini, Vrinda Marwah and Anjali Shenoi, Globalisation of Birth Markets: A Case Study of Assisted Reproductive Technologies in India, http://www.globalizationandhealth.com/content/7/1/27

25 Ibid.

speak English.) The question remains that whether surrogacy is exploitative or is it a mutually beneficial relationship?[26]

Allowing baby selling and surrogacy would mean that women remain being treated as anonymous interchangeable breeders and reinforces the objectification and subordination of women. Entering the market in this context is therefore far from liberating, but rather degrading.[27]

In the context of a rapidly expanding industry for reproductive technology, we should ask the question of whether or not we value women's individual choices over the rights of women more broadly. Alongside increasing exploration of the ways in which women and their work are framed within the international political economy (IPE), feminist debate has ensued over the consequences of the burgeoning global industry for reproductive technology.[28] Does the rise of such an industry benefit women's autonomy and the 'right to choose', or does it simply reinforce subordinating concepts of 'women's work' and gendered social roles to the detriment of women's rights? Women's reproductive capacity has become industrialized within the IPE through the rise of the global industry for reproductive technology and the framing of women's bodies as 'economic resources'.[29] The consequences of reproductive technology have been obscured by both a quest to make Western women mothers at all costs and thus a conservative blindness to the privileging of the rights of the West over the rights of the East.[30] Despite popular belief that surrogacy is 'okay' because it reinforces the concept of a woman's 'right to choose', it is necessary to question in whose

26 http://www.webmd.com/infertility-and-reproduction/features/womb-rent-surrogate-mothers-india

27 Centre for Social Research, Surrogate Motherhood: Ethical or Commercial

28 A. Bandarage, Women, Population And Global Crisis, 1-23(1997); M Mies, Patriarchy And Accumulation On A World Scale: Women And The International Division Of Labour (1986); J Pettman, An International Political Economy Of Sex, In Worlding Women: A Feminist International Politics 185-207 (St Leonards: Allen & Unwin, (1996).

29 R. Petchesky, The Body As Property: A Feminist Re-Vision, In Conceiving The New World Order: The Global Politics Of Reproduction, 387-406 (F. Ginsberg, R. Rapp Eds., 1995); J Raymond,Women As Wombs (1994).

30 Lucy Rash, Casey Burchell, Surrogacy: A right to choose or a responsibility to question, Mary Journal, 2012, http://mary-journal.tumblr.com/article1.

interests reproductive technology has been developed as well as exactly how necessary the quest for motherhood really is. It may finally be time to restrict the individual liberties of the West in order to benefit all women.[31]

Commercial surrogacy- the payment of a surrogate to reproduce for the benefit of the 'other' legitimises women's servicing the consumer through the industrialization of a seemingly 'natural' and 'biological' entity.[32] Although 'women's work' is largely undervalued within the IPE due to its association with the domestic sphere, commercial surrogacy is seen as acceptable.[33] Feminist political economist Deborah Spar and ecofeminist Vandana Shiva suggest that although the international political economy's focus on the model of the rational, male citizen and liberal free-market rhetoric has largely excluded women from the public economic system, surrogacy is seen as a legitimate form of 'work' because it involves the servicing of a consumer.[34] The industrialization of women's reproductive capacity therefore sets up an expectation that women should feel obliged to become mothers but will only be paid if their work involves the servicing of a consumer.[35]

Surrogacy exemplifies the ways in which the industrialization of women's reproductive capacity has created a double standard in the treatment of women between the East and West. Whilst reproductive technology has been argued to allow Western women to pursue a perceived 'right' to conceive,[36] women in the East are discouraged from bearing children due to what feminist multicultural theorist Asoka Bandarage understands as the Malthusian 'population problem'.[37]

31 Ibid.

32 Ibid.

33 J. Pettman, An International Political Economy of Sex in Worlding Women: A Feminist International Politics, 185-207 (J Pettman, ed., 1996).

34 V. Shiva, Caliber of Destruction: Globalization, Food Security and Women's Livelihoods, 1-28 (1996); Dl Spar, The Baby Business: How Money, Science, and Politics drive the Commerce of Conception, Xi (2006).

35 U Narayan, The Gift Of A Child: Commercial Surrogacy, Gift Surrogacy, and Motherhood, in Expecting Trouble: Surrogacy, Fetal Abuse, & New Reproductive Technologies 177-201 (P Boling Ed., 1995).

36 Supra n. 3 at 156-176.

37 Supra n. 28.

Essentially, increase in population is framed by the West as being of dire concern to environmental, social, and political problems; thus population control is seen as the solution.[38] It is the world's poorest women that are targeted in this operation[39] creating a double standard in the valuation of reproduction within the international political economy.[40] Not surprisingly, it is often the world's poorest women too that are engaged to become surrogates. Essentially, the West's access to reproductive technology here is reliant upon a premise of poverty; when it is illegal to financially engage a surrogate in their country of origin, it is still possible for the commissioning parent(s) to engage a surrogate in a community that has little government regulation to protect individual surrogates from capitalist exploitation.[41] The exchange of a financial sum entitles the commissioning parents to both a service and to consumer rights.[42] However, this effectively ensures a poor woman's body is bound by contract to deliver a service which taking into account the possibility of a lack of adequate health care is difficult to conceive as unproblematic for women external to the West.[43] Surrogacy effectively caters to the needs of the West at the expense of those women who are subject to the harmful effects of a globalised reproductive industry.[44] Any industry that promotes the commodification of women's bodies is problematic in conceiving of women's autonomous bodies.[45] The industrialization of women's reproductive capacity has effectively created a hugely profitable market for the control of women's bodies. [46] What has emerged is a hugely problematic link between the 'right to chose' and the exploitative

38 J Vidal, Population Control Best Way to Cut Emissions, The Age, 4 December 2009, from URL: http://www.theage.com.au/world/population-control-best-way-to-cut-emissions-20091203-k8oz.html.

39 Ibid.

40 Supra n. 28.

41 Supra n. 34.

42 L. Andrews, Women's Autonomy, in Surrogate Motherhood: Politics and Privacy, 167-181 (L. Ogalthorpe Gostin ed., 1990).

43 Supra n. 35.

44 Supra n. 30.

45 S. Jeffreys, The Industrial Vagina: The Political Economy of the Global Sex Trade (2008).

46 Supra n. 30.

pursuit of capital which has resulted in the material and ideological control of women's bodies. Whether or not we as women should engage in surrogacy remains a question of whether or not we value individual 'choice' over the advancement of women's rights more broadly.[47]

Gender and Poverty

The surrogacy debate disproportionately impacts women. In the case of surrogacy, however, the disproportionate impact is due largely to the biological reality that only women can be gestational surrogates and that the demand for female body parts, namely the eggs and womb, cannot be met by any other demographic.[48] Lisa Ikemoto, a bioethics and legal scholar, has articulated her concerns that women would be systematically underprotected in surrogacy arrangements, stating that the "interplay between biological essentialism and commodification of the women who are the means to the end may permit a laxness in minimizing risk to those women."[49] Indeed, because women tend to be at a greater risk of being marginalized and exploited,[50] particularly in conservative or poverty-stricken societies,[51] there is concern that women may be forced against their will into lives as gestational surrogates.[52] In addition, the lack of meaningful education and employment opportunities may be a powerful motivation for the provision of surrogacy services, resulting in women becoming surrogates out of necessity,[53] which could perhaps lead to some women failing to give truly informed consent. Furthermore, surrogates may actually reinforce gender hierarchies in their attempts to resist the stigma

47 Ibid.

48 Lisa C. Ikemoto, Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services, 27 Law & Inequality 305,307 (2009).

49 Id. at 305.

50 Anne Donchin, Reproductive Tourism and the Quest for Global Gender Justice, 24 Bioethics 325-26 n.19 (2010);

51 Ibid.

52 Supra n. 19 at 301-02.

53 Iris Leibowitz-Dori, Womb for Rent: The Future of International Trade in Surrogacy, 6 Minn. J. Global Trade 329, 331 (1997).

associated with surrogacy.[54] For example, some Indian surrogates who were interviewed about their work reportedly responded with an "emphasis on the morality of husbands, their 'generosity' in giving permission to their wives to be surrogates, and a striking absence of any narrative about surrogacy as paid work done by women."[55] In other instances documented in India, surrogates' families "often spoke of surrogacy not as individual (woman's) choice or work, but as a 'team effort' made by the entire family to improve the members' financial situation."[56] When interviewed, one father-in-law of a surrogate stated that he had "decided not to 'become a surrogate' again" due to perceived inequities in pay when "we delivered two babies" but "still we got the same rate."[57]

Poverty is another troubling element of the surrogacy trade.[58] The potentially coercive influence of offering money for the sale or rental of body parts, services that do not require existing wealth or education, may create situations in which the sellers are disproportionately those who have nothing other than their bodies to sell.[59] Poverty induces people to resort to work that separates them from their families or jeopardizes their health. These conditions put pressure on women to become sex workers, surrogates or ovum donors.[60] In low-income countries with permissive regulatory standards or poor enforcement of surrogacy laws, it thus stands to reason that cottage industries and "tourist" trades are likely

Health And Human Dignity

The link between poverty and health is well-documented.[61] However, despite their often low socioeconomic status, surrogates initially are in good health

54 Supra n. 19 at 303.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid. at 297 (2010)

59 Supra n. 50 at 326.

60 Anne Donchin, Reproductive Tourism and the Quest for Global Gender Justice, 24 Bioethics 326 n.19 (2010) to become prevalent.

61 See, Allyn L. Taylor & Karen C. Sokol, The Evolution of Global Health Law in a Globalized World, in 1 The Global Community: Yearbook of International Law and Jurisprudence 19 (Giuliana Ziccardi Capaldo ed., 2008) (noting that "income is the primary determinant of health in low income countries").

because the provision of surrogacy services depends on it.[62] Furthermore, surrogates tend to use their earnings to lift their families out of poverty, which presumably improves their families' health. As a result, the general association between poverty and poor health may not be reflected in an examination of surrogates and their families, with the possible exception of health-related surrogacy risks, discussed in detail below. Nevertheless, it is likely that many of the risks of surrogacy will be borne by individual surrogates as a direct result of their work.

These procedures frequently involve the administration of synthetic hormones injected to produce abnormal numbers of eggs. As a result, when a pregnancy is successfully produced, it often consists of multiple embryos. The surrogate is then subjected to much higher levels of risk than a normal single pregnancy involves. Post-natal health care costs for treatment of complications are often not covered. Furthermore, the costs of health care provided to infants born with congenital problems may not be claimed by the intended parents. A typical situation is the case of the surrogate mother who was pressured to have an abortion after the fetus she was carrying failed to meet the quality specifications of those who hired her when they were informed that the fetus had Down Syndrome.[63] Surrogate transactions are often facilitated by entrepreneurs operating without supervision or monitoring of women's health, and with little apparent concern about protecting surrogates from exploitation or criminal abuse.[64] In 2009, what is known as the "Romanian scandal" was exposed. Israeli doctors were involved in the trafficking of eggs of young poor women at SABYC clinic in Romania, some of whom were only 15 years old, with little understanding of the health risks involved. In one example, a 16-year-old factory worker was left in critical condition after the procedure. The arrest of the doctors and agency operators by Romanian police revealed the ways the

62 Kalsang Bhatia et al., Surrogate Pregnancy: An Essential Guide for Clinicians, 11 Obstetrician & Gynaecologist 49, 52 (2009).

63 J. Guichon, Don't let market forces govern human procreation, Bionews, 22.November 2010.

64 Hedva Eyal, Reproductive Trafficking, Genewatch, http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=313.

international reproductive industry is working as a free zone with no ethics or responsibility for respecting human rights or human dignity.[65] Any time that there is an exchange of money for access to the body or body parts, there is the risk of harm to human dignity.[66] One risk is that poor women, who comprise a majority of surrogates, may begin to value themselves as the market values them--based on age, health history, or any other factors that cause a surrogate's "price" to rise or fall.[67] Existing cultural views of women as second-class citizens may further compound such a skewed sense of self-worth. These cultural views include practices that treat women as property, such as marital dowries; deprive them of property, such as unequal or gender-biased inheritance laws; or view them as burdens which are less valuable than their male counterparts, such as preferential feeding and access to education for male children, sex-selective abortion, and girl-child infanticide.[68] Indeed, the very act of serving as a surrogate may be seen as stigmatizing to the surrogate and her family.

Although a surrogate presumably will not face rape or physical abuse by those involved in her contracted pregnancy, she obviously risks damage to her health, including death, in the scope of her duties.[69] The risks of pregnancy are well-known, may be life-threatening, and increase with the number of fetuses in the womb or number of past pregnancies.[70] Even in the "best case scenario" in which the pregnancy is uncomplicated and the baby is born healthy and without the need for cesarean section surgery--the surrogate will face the pain of labor (or,

65 Scott Carrny, International Baby Market, Red Market Blog, http://redmarkets.com/2010/08/international-baby-maker.html.

66 Some commentators believe that the commodification of the body, even for reproductive purposes, is so fundamentally incompatible with human dignity that it is "ethically unacceptable." Cynthia B. Cohen, Selling Bits and Pieces of Humans to Make Babies: The Gift of the Magi Revisited, 24 J. Med. & Phil. 305 (1999).

67 Supra n. 19 at 305.

68 See generally Geetanjali Gangoli, Indian Feminisms: Law, Patriarchies and Violence in India (2007) (discussing these cultural views and their impact on reform in India). surrogate and her family.

69 Supra n. 63 at 52-53.

70 Susan Donaldson James, Surrogate Mom Damages Heart After Four Babies, ABC NEWS, Mar. 3, 2011, http:// abcnews.go.com/Health/surrogate-mother-suffersheart-damage-giving-birth-children/story?id=13028197.

alternatively, potential complications from epidural administration), and may face physiological damage from the birthing process, infection, negative health effects flowing from pregnancy, such as weight gain, postpartum depression, and the emotional upheaval[71] that comes with giving to others a child that one has nurtured and birthed.

Surrogacy also carries with it the challenge of balancing the interests of the prospective parents with the interests of the surrogate.[72] The interests of the surrogate (e.g., maintaining personal health, human dignity, and financial interests that can be met only by delivering a healthy baby) could be at odds with the interests of the parents (e.g., a financial interest in minimizing cost[73] or a desire to obtain a healthy baby even at the expense of the health of the surrogate).[74]

Legal Issues

Nowadays, a parent's surrender of a child for a fee, known as baby selling, is a crime all over the world. In addition, many countries have regulations limiting or prohibiting compensation of intermediaries related to the transfer of a child.[75] Although gestational surrogacy is (partially) legal in several countries around the globe, in most jurisdictions it is not. Going to another country to avoid local prohibitions is not always an option. Sometimes, the nation's provisions apply only to that country's residents. People who want to take advantage of the laws in that particular country must, therefore, first establish residency there.

ICMR Guidelines, 2006

India is a thriving hub for surrogacy. To address the various issues involved in surrogacy and to regulate surrogacy arrangements, the Government of India

71 Supra n. 63 at 52.

72 Certainly, any child born via surrogacy also will be impacted by the parameters of the surrogacy arrangement; Supra n. 22.

73 Craig R. Sweet, Surrogacy: Practical Medical Aspects, AM. Surrogacy Center, INC., http://www.surrogacy.com/ medres/article/aspects.html (last visited Feb. 2, 2014).

74 Supra n. 22.

75 Field, A. Martha, Surrogate Motherhood, 224 (1988).

has taken certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006. The guidelines have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India. Below are the main points from these guidelines:

DNA tests are compulsory to determine that the intended parents are indeed the genetic parents. If this is not the case the child must be adopted instead. Surrogacy should normally only be an option for patients for whom it would be physically or medically impossible/ undesirable to carry a baby to term. The payments received by the surrogate mothers should be documented and cover all genuine expenses associated with the pregnancy. The responsibility of finding a surrogate mother should rest with the couple, or a semen bank, not the clinic. A surrogate mother should not be over 45 years of age. The ART clinic should ensure possible surrogate woman satisfies all the testable criteria to go through a successful full-term pregnancy. No woman may act as a surrogate more than three times in her lifetime. The surrogate mother must declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank. A relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple.

The draft ART (Assisted Reproductive Technology) Bill, 2010

A new bill is in the works to regulate the practice of surrogacy aiming to avoid some of the pitfalls of the ICMR guidelines discussed above. Despite this commitment, India's medical tourism industry is completely unregulated, however, discounting some short guidelines from the Indian Council of Medical Research (ICMR) as discussed above.

The Artificial Reproductive Technology (Regulation) Bill defines surrogacy as an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over

the child to the person or persons for whom she is acting as surrogate; and a surrogate mother' is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parent(s).

By this definition, Surrogates will now be forced to use only in-vitro technologies even though they can get pregnant with methods like artificial insemination which are much safer for them.

Among other things, the intent of the ART Bill is to draw up binding rules for surrogate agreements, to look after the interests of both the planned parents and the surrogate mothers. The bill lays down limits on the age of the surrogate mother and the number of pregnancies she can complete. A national authority is to be set up to regulate the fertility clinics and to receive and handle complaints about them. Payment for surrogacy will be permitted, and the contract must include a life assurance policy for the woman. The bill also specifies that the intended parents must be given as legal parents on the birth certificate, and at the same time they must undertake to take in the child irrespective of any disabilities or other circumstances (e.g. divorce between the parents during the pregnancy). The surrogate baby will be recognised as the legitimate child of the commissioning couple even if they divorce or become separated, with the child's birth certificate carrying both genetic parents' names. Thus, the Bill that is meant to safeguard the provider and to commissioning couples does not seem to protect the rights of the surrogate. She is the most marginalized and vulnerable one in this arrangement. Finally, the bill contains a proposal to set up 'banks' of potential surrogate mothers so that clients can deal with them directly in order to avoid clinics and middlemen monopolizing the contact and taking the lion's share of the payment.[76]

As stated, the bill has not yet been passed, so the area remains unregulated until further notice.

76 Saxena Et Al., Surrogacy: Ethical And Legal Issues, 37 Indian Journal Of Community Medicine, 211-13 (2012).

Although there are now some rules and regulations in place, not enough is done at a national level to protect the interests of Indian women who serve as surrogate mothers, the children they bear, or those intended parents who travel considerable distances to commission pregnancies.

Conclusion

Advocates of surrogacy argue that the surrogacy agreements are beneficial for all parties involved as the needs of two desperate women are met. It is often said that in the surrogacy arrangement, 'the barren gets a baby, the broke gets a bonus'.

Surrogacy is perhaps unique among contracted uses of the body in terms of the quality of health care a service provider can expect to receive. In fact, it is in the interest of the prospective parents to protect the health of the surrogate, because it increases the likelihood of delivering a healthy child.[77] This, indeed, is one of the ways gestational surrogacy may be beneficial for surrogates: despite the risks they undertake by agreeing to carry and deliver a child, they at least are likely to receive a level of medical care higher than the level of care their nonsurrogate peers receive.[78] Furthermore, some argue that women's ability to be surrogates and to be paid handsomely for their service may actually increase the surrogate's feelings of control and self-worth, while at the same raising the status of childbearing as a valued and respected process.[79] Additionally, as discussed above, some view surrogacy as a form of mutual assistance--two or more people helping each other to obtain what alone none of them could have obtained: a child for one and a better life for the other.[80] While commercial gestational surrogacy may not be attributed with the same level of altruism as,

77 Casey Humbyrd, Fair Trade International Surrogacy, 9 Developing World Bioethics 118 (2009).

78 Supra n. 19 at 296.

79 Jean M. Sera, Surrogacy and Prostitution: A Comparative Analysis, 5 AM. U. J. Gender & L. 315, 316 (1997).

80 Journey to Parenthood, Oprah Winfrey Show (Jan. 1, 2006), http://www.oprah.com/world/Wombs-for-Rent.

for example, a woman carrying a child for her infertile sister for free,[81] there is nonetheless an argument that surrogacy is a unique service that permits the surrogate to be honored for her work, and to enjoy the feeling of having helped another family.[82]

One of the major highlights of surrogacy is the overwhelming economic opportunities for surrogates in light of their educational background and social circumstances. Interviews with these women generally result in optimistic correspondences, with women expressing positive outlooks on buying a home, educating their children, or paying off debt. If surrogacy contracts are transparent and surrogate mothers are protected by adequate laws, then one could argue that shifting the income generation to mothers does lead to empowerment.

We face a conflict of rights magnified by border crossings in a condition of global injustice: in satisfying a developed world woman's reproductive right to access surrogacy as a solution to the problem of infertility, are not developing world women's rights to make reproductive decisions free of coercion being violated?

Without a foolproof legal framework, surrogates will invariably be misled and exploited. The proposed Assisted Reproductive Technology Bill, 2010 is expected to beef up surrogacy guidelines authored by the Indian Council of Medical Research (ICMR) that have often gone unheeded by the few hundred Indian fertility clinics accustomed to writing their own rules. There is an urgent need to initiate processes for a critical understanding of 'surrogacy', that has assumed the proportion of a transnational industry towards building a collective, feminist response to it.

81 See Brigitte Clark, Surrogate Motherhood: Comment on the South African Law Commission's Report on Surrogate Motherhood (Project 65), 110 S. AFR. L.J. 770 (1993).

82 Supra n. 81 at 332-33.

Genetically Modified Food: Venom in our Salvers? Consumer's Right to Know

*Bhuvanyaa Vijay**

Introduction

The issue relating to Genetically Modified[1] Foods/Crops has garnered intense public debate,[2] whether by preoccupying the Government's attention, or that of more critical stakeholders, like the civil society and the farming community, globally and in India. Though it has been emphatically asserted, time and often, that GM Foods shall go a dramatically long way in tackling the global food crisis; scepticism, dubiety and apprehension continue to cincture the situation.[3] Like all new technologies, GM and similar genetic-tinkering with the food we consume, poses risks—more unknown than known,[4]as exemplified through

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1 Hereinafter 'GM'.

2 Most contentions in the debate involve the costs and benefits of the GM Crops/ Resultant food products and the intrinsic safety concerns. See Report of the RajyaSabha Secretariat, Research Unit, Genetically Modified Crops: Issues and Challenges in the Context of India (December 2009), available at http://rajyasabha.nic.in/rsnew/publication_electronic/gen_modify_crops.pdf (Last visited on June 30, 2014).

3 World Health Organisation, 20 Questions on Genetically Modified Foods, available at http://www.who.int/foodsafety/publications/biotech/20questions/en/ (Last visited on December 20, 2013).

4 It has been indubitably acknowledged that despite umpteen cases of GM Foods having wronged the health of numerous people, it's difficult to identify health problems from such foods, even if widespread. This is primarily because no one is monitoring for this and even if so, it could take decades to establish a cause-effect relationship between GM Foods and the diseases they bring out to manifest. Judy Carman, in her research paper, "Is GM Food safe to eat?" has mentioned that we need a "critical mass of clinicians" to individually recognise that they've been coming across a lot of a particular symptom in patients, then ask their colleagues in different cities and parts of the world, if they have seen the same, consequently, pushing for an investigation. It is to be realised that finding cases of illness shall just comprise Step1. What must follow is linking GM Food as a cause behind the same. See Judy Carman, Is GM Food Safe to Eat?,(2004) available athttp://gmojudycarman.org/wp-content/uploads/2013/06/Is-GM-food-safe-to-eat.pdf(Last visited on December 13, 2013).

the flagrant dearth of non-GM Industry sponsored reports validating safety of GM Foods.[5]

Why are GM Foods inept for consumption and how the arguments of its proponents find no tangible grounds? How far have laws and regulators in US and in India, protected the right of the consumers to good health by indorsing their right to know?

The researcher conducted a survey with 160 persons of whom 90 responded. The number of respondents, and hence the sample size is 90. The age group of the respondents varies from 18-30 years and all of them are currently pursuing undergraduate/post-graduate courses from varied colleges of this country, and affirmed to have elementary background information about Genetic Modification and its application for food production.

The question asked was—"Why will you as a consumer, prefer eating Genetically Modified Food? Please select one option given—a) I'll prefer GM Food because I believe Bt is a naturally occurring bacterium producing toxins that are lethal only to pests and consuming Bt-gene containing food will have no effect on my intestinal flora. I trust studies and approvals given by the regulators of developed countries, like the FDA. b) The 'Gene Revolution', as it claims, will bring about substantial increase in marketable yields with an effective solution for the food crisis gripping India and the world. c) Pricing of seeds, as based on a cost-recovery model shall make it affordable for all farmers."

The article has restricted itself to a general and non-technical overview and focussed on only two countries, the US, by dint of being the largest GM Crop Producer and India, the nation of the researcher's direct concern. The agenda of the paper is to espouse consumer's right to know, springing from their right to good health and the much-evidenced uncertainty about GM Food safety. In this light, the researcher has attempted to discuss the related arguments and challenges pertaining to GM Foods.

5 See Jeffrey M. Smith, Genetic Roulette, 2: Industry is in charge of safety (2009).

Overview of the Process and Possible Effects

"Before delving into the nuances of issues posed above, it is paramount to comprehend what genetic modification is, as a process, and how, as a technology, it proposes an imminent cataclysm in terms of the wide-spread, unpredictable changes and health-problems it may unleash. Expressed unambiguously, the process involving isolation of gene(s) from the genome of one organism and insertion of the same into the genome of another organism6 is GM.[7] It is crucial to mention here that in nature, such an exchange of genes is possible only between compatible (i.e., the same) or very closely related species. However, GM has facilitated even inter-specie gene transfer, regardless of compatibility. This includes the engineering of corn and cotton varieties to generate an inherent pesticidal protein called Bttoxin(from the parent-gene bacteria, Bacillus thuringiensis) apart from allowing us to bring a character from say pigs into human beings, or from human beings to rice, etc.[8] Meddling with genes in this manner, leading to myriad permutations and combinations, is akin to courting disaster,[9] for anything against the order set by nature may prove unsuspectingly and inadvertently catastrophic. It may be noted from common experience that any foreign substance in the body, including something as teeny

6 The cells of living organisms possess a DNA-comprising nucleus which is a long molecule carrying a unique set of instructions regarding the cell's size, strength and other characteristics. The DNA is divided into small sections called 'genes' and all the DNA within an organism is referred to as its 'genome'.

7 The Codex Alimentarius Commission, an organisation formed in 1963 by the Food and Agriculture Organisation and World Health Organisation to bring about the coordination of all food standards work by international governmental and non-governmental organisations, defines Genetically Modified/Engineered Organisms as, "Genetically engineered/modified organisms, and products thereof, are produced through techniques in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination." See, Codex Alimentarius Commission, Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods, 5, available athttp://www.fao.org/organicag/doc/glorganicfinal.pdf (Last visited on July 5, 2014).

8 Kavitha Kuruganti and G.V.Ramanjaneyulu, Genetic Engineering in Indian Agriculture—An Introductory Handbook, Centre for Sustainable Agriculture (2007).

9 This has been noted by Shiv Chopra, acclaimed Canadian Human Rights Activist and Microbiologist. See, Shiv Chopra, The Politics of Food Safety, October 18, 2012, available at http://shivchopra.com/category/articles/ (Last visited on June 2, 2014).

as a mere brier poses the risk of causing inflammation and infection, unless removed. By this analogy, consuming GM Food is agnate to, sanctioning the very entry and residence of foreign, and in most cases, incompatible genes to dwell within the body and let the foes inflict havoc not from without but from the safe and conducive interiors of the consumer's body".

Genetic Modification/ Book Analogy

Comparing DNA to a book,[10] it shall be prudent to comment that just like the pages in a book bear meaning only as long as they are arranged in a given sequence, the genes in DNA perform desired functions only when arranged in a pre-defined, nature-decided genetic sequence. GM shall be analogous to plucking the pages of one book and striving to insert it within another book, with a completely different genre or most importantly, a distinct makeup, story-line and character/scene setting than what the parent book encompassed. The result is that the story shall become indecipherable. In the instance of DNA, the ensuing result of GM is far more calamitous. Being a dynamic, living element, the new genetic sequence becomes potently capable of generating utterly mysterious and unfamiliar proteins and executing unheard-of functions, to the fatal peril of the consumer of such GM Food. Linking this to the book analogy, it shall be as if the inserted page(s) brings about a conscious goulash and hodgepodge of the letters of hitherto correctly spelt words in the original book, misspelling, deleting, inverting and scrambling them. With letters switched, words out-of-whack, sentences deleted/repeated and chapters relocated, the original book is now downrightly unreadable and incomprehensible. Thus, unintended proteins are produced due to scrawled amino-acid sequences and inserted genes may transfer from the food into the gut bacteria/internal organs. Combining these two risks, what emerges is a mightily lethal menace. To explain using an example, if the corn gene that created the *Bt* toxin were to transfer into the gut bacteria (like parts of the soy gene have been doing, as expounded later in the paper), it might turn our intestinal flora into living

10 Jeffrey, Supra n. 5, at 3.

pesticide factories.[11] The above may sound incredibly ridiculous to those yet unexposed to the dreads and horrors caused by ingestion of GM Food. Certain biotech proponents even seek to counter such allegations by regarding them as pure speculation, since there are no studies to show that Bt genes also transfer. However, this precisely, is the researcher's point. As of now, there are no studies on Bt gene transfer to human gut bacteria. As of now, we don't know whether this may happen because no one is looking that way. As of now, what we are being served on our platters is nothing more than the product of an 'infant science' that like a Damocles Sword, looms peril on the horizon, at a scale unprecedented and bearing consequences, unimaginably wide-spread and appalling. Biotechnology giants seem to be awfully efficient at gambling that this and many other untested dangers won't materialise. Regulators, globally, seem to be in a palsy nexus with the profit-oriented giants and finally, and the most importantly, consumers, majority of whom are unaware, are at the mercy of the former two, becoming the lab-rats and guinea-pigs of a technology far too uncertified and greenhorn to be left unbridled among us.

Consumers' Right to Good Health and Ensuing Right to Know About GM Food

In the Universal Declaration of Human Rights,[12] adopted to affirm and uphold the "dignity and worth of the human person", Article 25(1), clearly spells out that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family". This, along with a close reading of Articles 3[13] and 19[14] of the Declaration, which mention the right to life and

11 Though, it must be realised that unless tangible evidence proves the same, all of this stays conjecture. However, this essentially is the researcher's argument. Unless there is concrete verification of the safety of GM Foods, they cannot be allowed to peril the lives and existence of the consumers.

12 Adopted by the United Nations General Assembly on December 10, 1948, available at http://www.un.org/en/documents/udhr/ (Last visited on December 14, 2013).

13 Article 3, The Universal Declaration of Human Rights, 1948: "Everyone has the right to life, liberty and security of person."

14 Article 19, The Universal Declaration of Human Rights, 1948: "Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

liberty of a person and the right to freedom to seek and receive information, respectively, coherently connote the unsurpassed importance that has been attached to preserving and maintaining every individual's health. In the given milieu, and considering the untested, detrimental nature of several GM Food, it is absolutely necessary that consumers' right to know about the food they are eating be upheld, apart from ensuring that no such consumable item is left loose on them, which directly and catastrophically plays mayhem with their health. They own the entitlement and privilege of being supplied with only the most carefully verified food[15] and have the independence of making informed choices, springing from their right to know.

In the context of India, there exist several DPSP[16] that distinctly expound on the State's duties to promote, preserve and maintain good public health, with Article 47, Constitution of India regarding the "improvement of public health" as among the State's primary duties.[17] While DPSP are non-justifiable and no erson may claim their enforcement,[18] the Supreme Court of India[19] through countless judgements has read the 'Right to Good Health' within the ambit of Article 21 of the Constitution.[20] The apex court of the country has time and again held that the right to life as enshrined in Article 21 entails something more than survival or animal existence, and includes the right to live with human

15 Verification entails testing not just within the strictly regulated environs of the laboratory on near-human animals, but also includes the real world authentication of the given food, ensuring its interactions with other living organisms is absolutely and unconditionally benign.

16 Directive Principles of State Policy.

17 Article 38 mentions securing a "social order for the promotion of the welfare of the people" which isn't possible without sound public health; Article 39(e) envisages protection of the health of workers; Article 41 directs the State to make "effective provision" for assistance in cases of sickness; Article 42 makes provisions for the health maintenance of mothers and finally Article 48A, though mentioning the "Protection and improvement of environment" as the Directive, ultimately keeps the good health of the citizens as its objective. The researcher, thus notes, that a great number of DPSP are dedicated to endorse the good health of citizens.

18 However, despite being non-justiciable, Article 37 lays down that the DPSPs shall be "fundamental in the governance of the country".

19 Hereinafter 'SC'.

20 Article 21, The Constitution of India, 1950: "No person shall be deprived of his life or personal liberty except according to the procedure established by law."

dignity. Such a liberal interpretation has allowed the SCto read several rights in Article 21 to make 'life' more meaningful and worthliving. Most significant stands C.E.S.C Ltd. v. Subhash Chandra Bose and Ors.[21]which stated that "In the light of Arts. 22 to 25 of the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights and in the light of socio-economic justice assured in our Constitution, right to health is a fundamental human right."[22] Similar was the stand in Consumer Education and Research Centre v. Union of India and Ors.[23] which stated that "it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution".

In the background of such judicial pronouncements, it stands lucidly unblemished that every citizen and consumer in India, holds a much cherished right to live a life with good health, something which consumption of GM Food blatantly impairs, as is evident from several scattered but related incidents of GM Food Consumption leading to completely bizarre diseases and symptom manifestations among individuals.[24]

Thus, without authentic safety validation, GM Food mustn't be allowed in the markets and secondly, for those crops/foods, regarded to be innocuous and currently allowed, consumer's right to be informed of the food being served must be upheld by mandating labelling of GM Food Products. This may not account for a fool-proof measure as there shall still remain foods which aren't packaged and hence can't be labelled, but contain gene-tinkered content. The

21 C.E.S.C Ltd. v. Subhash Chandra Bose and Ors., AIR 1992 SC 573.

22 Other significant case laws, including right to good health under the ambit of Article 21, and hence as a justifiable right, are ParmanandKatara v. Union of India(AIR 1998 Delhi 200), State of Punjab v. Ram LubhayaBagga (1998 AIR 1703 Supreme Court of India), Vincent Panikurlangara v. Union of India &Ors.(1987 AIR 990 Supreme Court of India).

23 Consumer Education and Research Centre v. Union of India and Ors., 1995 AIR 922(Supreme Court of India).

24 This has been discussed in Section 1.4.

threshold values[25] and norms may change from country to country, leading to further glitches, particularly in a globalised world, which relies on food export/import. Notwithstanding the above, labelling of packaged GM Content possessing foods,[26] shall still be a laudable step to at least inform consumers, if not divorce them completely from risks engendered.

Case Laws in US Speaking for Dangers Unleashed by GMOs

David Suzuki[27] has rightly pointed out—

"Context is crucial. Yet genetic manipulation of food ignores millions of years of evolutionary context, and that could have serious implications in the future. We aren't dealing with an insignificant change to our diets here; we're dealing with a revolutionary technology being used in our food supply—affecting us, future generations, and the ecosystems on which we depend."

With GM potatoes causing health problems in rats,[28] and the widely-known Flavr-Savr Tomatoes, the first approved GM crop in the US, causing bleeding stomachs in rats, with death of several others, Arpad Pusztaihas rightly pointed that the "claim that these GM tomatoes were as safe as conventional ones is at best premature and, at worst, faulty."[29] Internal documents reveal that the FDA[30] scientists were concerned about the safety trials causing rat-bleeding. However, this was kept secret in 1992, when FDA policy on GM Food was made public: "The agency is not aware of any information showing that foods

25 The minimum permissible value of GM Content in a given food item, above which labelling is required.

26 See Section 1.5.

27 David Suzuki, Co-Founder of the Suzuki Foundation and an award-winning Japanese-Canadian scientist, environmentalist and broadcaster. See, David Suzuki, Genetically Modifying our Food, available athttp://www.iatp.org/files/Genetically_Modifying_Our_Food.htm (Last visited on June 6, 2014).

28 Dr. Stanley W.B. Ewen, Effect of Diets Containing Genetically Modified Potatoes Expressing 'Galanthusnivalislectin' on Rat's Small Intestine, 354(9187) The Lancet 1353 (October 16, 1999).

29 Arpad Pusztai, Can Science Give Us The Tools for Recognising Possible Health Risks of GM Food, 16 Nutrition and Health 73, 82 (2002).

30 United States Food and Drug Administration.

derived by these new methods differ from other foods in any meaningful or uniform way." It was only seven years later when the full results of the study and the FDA Scientists' original reports were made public, following a lawsuit forcing the agency to divulge its internal files (EnzoBiochem, Inc. v. Calgene, Inc.[31]). This was one of the typical exposures of the nexus among the White House, FDA and Monsanto.[32] With the skeletons dropping out of the cupboard in the form of 44,000 pages of hidden report it was revealed that "references to unintended negative effects", had been "progressively deleted from drafts of the policy statement." More worm-filled cans were un-canned when it was revealed that the FDA was under orders from the White House to promote GM Crops and that Michael Taylor, Monsanto's former attorney and later its Vice President, was brought into the FDA to oversee policy development.[33]

Cases like J. Rapoport and Leonard Rapoport v. Showa Denko[34] augment the aura of enigma surrounding GM Food. Herein, the Japanese manufacturer employed genetically engineered bacteria to produce a dietary supplement, L-tryptophan more economically, leading to an eccentric disease, EMS,[35] causing deaths in hundreds and leading the court to order around two billion dollars as compensation.[36]

The above mentioned landmark incidents, apart from other controversies relating to GM Roundup Ready soybean[37] and StarLink corn,[38] and GMOs

31 EnzoBiochem, Inc. v. Calgene, Inc., No. 98-1438, -1479, 188 F.3d 1362, 52 U.S.P.Q.2d (BNA) 1129 (Federal Circuit September 24, 1999).

32 Monsanto Company Inc. is the largest multi-national biotech giant, at present. It over Calgene in 1996-97.

33 Jeffrey, Supra n. 5.

34 J. Rapoport and Leonard Rapoport v. Showa Denko, 953 F.2d 162 (United States Court of Appeals, Fourth Circuit).

35 Eosinophilia Myalgia Syndrome.

36 Mahesh Bhatt and Ajay Kanchan, Documentary: "Poison on the Platter", 2009.

37 See G. Meister and T. Tuschl, Mechanisms of gene-silencing by double-stranded RNA, 431 Nature 343, 346(2004) and C. Mello and D. Conte, Revealing the World of RNA Interference by Roundup Ready, 432 Nature 338, 341 (2004).

38 See Jeffrey L. Fox, USDA, EPA remove StarLink Corn from feed, 19(298) Nature Biotechnology (2001).

affecting non-target organisms[39] if not fully convince consumers against the consumption of GM Food, must at least arouse disbelief and uncertainty in the claims of the profit-oriented MNCs which promised to turn "fields into factories and producing anything from life-saving drugs to insect-resistant plants." What has really transpired is a disparate scourge, affecting sundry people with unrelated diseases, taking decades to manifest, but ostensibly linked to GM Food consumption.

In *Organic Seed Growers and Trade Association* v. *Monsanto Company Inc.*[40] the court[41] ordered that "Monsanto would not take legal action against growers whose crops might inadvertently contain traces of Monsanto biotech genes (because, for example, some transgenic seed or pollen blew onto the grower's land)." Such an estoppel order[42] shall surely go a long way in protecting innocent farmers from being victimized by the patent claims of leviathan biotech giants, when even Non-GM Crop growing fields get contaminated by GM genes, leading to unintended crosses and finally finding a way on to the Consumer's Platter.[43]

39 See J.E.Loseyet al, Transgenic Pollen Harms Monarch Larvae, 399(6733) Nature 214, 215 (May 20 1999) and Richard L.Hellmich, Monarch Butterflies and Bt Corn, Iowa State University (November 26, 2012), available athttp://agribiotech.info/details/Hellmich-Monarch%20Mar%208%20-%2003.pdf(Last visited on December 13, 2013).

40 Organic Seed Growers and Trade Association v. Monsanto Company Inc. , Appeal from the United States District Court for the Southern District of New York in No. 11-CV-2163(United States Court of Appeal for the Federal Circuit), available at http://www.cafc.uscourts.gov/images/stories/opinions-orders/12-1298.Opinion.6-6-2013.1.PDF(Last visited on December 18, 2013).

41 The United States Court of Appeals for the Federal Circuit in Washington, D.C..

42 On September 5, 2013, the plaintiffs have appealed to the Supreme Court of the United States, aiming to attain full protection for the farmers.

43 This case is one of its kind, for after decades of judgements going in favour of the biotech MNCs (such as, Bowman v. Monsanto Company 569 U.S. 133 S.Ct 1761 2013, Supreme Court of the United States and Monsanto Canada Inc. v. Schmeiser2004 1 S.C.R 902 Supreme Court of Canada), the judgement partly seeks to benefit those who find themselves inadvertently affected by the genes in GM Crops, grown in fields adjoining theirs. In this light, a rethinking of US Patent Violation Claims has assumed the need-of-the-hour status among the regulators.

Indian Legal Context

In India, Section 22[44] of the Food Safety and Standards Act, 2006,[45]clearly prohibits the "manufacture, distribution, selling or importing of any genetically modified articles of food", except in accordance with the provisions contained in the above-mentioned Act and Rules and Regulations made thereunder. Despite this provision, as a pre-cautionary step, as we may like to call it, India has mandated labelling of GM Food Products with effect from January 1, 2013.[46]

However, with just five countries growing more than nine-tenths of all Genetically Modified Crops,[47]including India, US, Canada, Argentina and Brazil; GM Soy and Corn comprising more than three-fourths of acreage[48] and a significant quantity of the same being exported to nations around the world, including India, the applicability of Sec. 22 of the FSS Act, 2006 in the Indian context[49] seems highly dismal. What is astounding is that while law-suits questioning the execution of laws and challenging the

44 Section 22, The Food Safety and Standards Act, 2006: "Save as otherwise provided under this Act and regulations made thereunder, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, neutraceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf.".

45 Hereinafter FSS Act, 2006.

46 Such a step seems ironical and redundant in India, for as specified under Sec.22 FSS Act 2006(note 44) genetically modified articles of food may not be manufactured, distributed, sold or imported. Nevertheless, a cautionary provision has been inserted by amending Rule 6(addition of Sub Rule 7) in the Legal Metrology (Packaged Commodities) Rules 2011, by a notification dated June 5, 2012, with effect from January 1, 2013. Though no tolerance level or range of products is specified, the amendment reads—"Every package containing the genetically modified shall bear at the top of its principal display panel the words 'GM'".

47 USDA's National Agricultural Statistics Service and USDA's Economic Research Service, available at http://www.nass.usda.gov/ and http://www.ers.usda.gov/ (Last visited on December 19, 2013).

48 National Agricultural Statistics Service (NASS), Agricultural Statistics Board, United States Department of Agriculture, "Acreage Report June 2013" (June 28, 2013), available athttp://usda01.library.cornell.edu/usda/current/Acre/Acre-06-28-2013.pdf (Last visited on December 20, 2013).

49 In India, application of biotechnology in agriculture is being dealt with by three different Ministries/Departments: 1. Ministry of Agriculture; 2. Ministry of Environment and Forests; and 3. Department of Biotechnology, Ministry of Science and Technology.

functioning of regulators have been filed in the US, India has seemed to have borne a complacent stand,[50] possibly due to meagre consumer awareness (as has been demonstrated through a micro-sample in the Survey in Section 1.6) and apathetic regulators.[51] The Rules, 1989[52] have established six competent authorities[53] in our nation to deal with GMOs, with the Genetic Engineering Appraisal Committee[54] (GEAC)[55] being the forerunner.

With the Prof. M.S.Swaminathan Task Force been set up to formulate long-term biotechnology policy, the National Biotechnology Development Strategy formulated by the government in November 2007 and countless other Bio-safety regulations[56] being proposed and followed in India, using the Codex Alimentarius as a point-of-reference, the situation may appear well-tackled and ruddy, however, there is much dust under the carpet. While implementation remains a much-loved hitch, relying on the GEAC is not free from risks. WhileBt cotton approved by the GEAC in 2002, is still in wide commercial cultivation, BtBrinjal, though approved by GEAC in October

50 The only available significant court decisions remotely pertaining to the given issue are Aruna Rodrigues & Ors. v. Union of India ((2012) 5 SCC 331 Supreme Court of India) and National Seed Association of India, New Delhi v. State of Maharashtra (2013 Indlaw MUM 1087 Bombay High Court), both of which directed the Government to frame more comprehensive regulations governing the above issue.

51 "The legislative framework on agro-biotechnology rests mainly with the MoEF, which has under the Environment Protection Act, 1986, notified the Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro Organisms/Genetically Engineered Organisms or Cells, 1989, hereinafter referred to as the Rules, 1989".

52 Ibid.

53 "These are, the Recombinant DNA Advisory Committee (RDAC), the Institutional Biosafety Committees (IBSC), the Review Committee on Genetic Manipulation (RCGM), the Genetic Engineering Approval Committee (GEAC), the State Biotechnology Coordination Committee (SBCC) and the District Level Committee (DLC)".

54 Rahul Koul, Indian GM Appraisal Committee gets new claws, BioSpectrum, June 18 2013.

55 Formerly, the Genetic Engineering Approval Committee.

56 "Some prominent regulations include: Recombinant DNA Safety Guidelines, 1990 by Dept. of Biotechnology; Revised Guidelines for Research in Transgenic Plants, 1998; Protocols for Food and Feed Safety Assessment of GE Crops, 2008; Guidelines for the Safety Assessment of Foods Derived from Genetically Engineered Plants, 2008 by Indian Council of Medical Research(ICMR); and the Guidelines and Standard Operating Procedures(SOPs) for Confined Field Trials of Regulated, Genetically Engineered Plants, 2008".

2009, was banned by the Government of India in February 2010,[57] following concerns about health-hazards and contamination of natural brinjal varieties. The incompetency of GEAC couldn't have been more lucidly glaring and the predicament of the consumers, left at the mercy of devolved, malign purposes, couldn't have been more frightful.

In the context of jolts aroused by GM Food, countries like Japan, Russia, Brazil, China, India and fifteen nations in the European Union have mandated labelling of GM Foods, to provide for the Consumers' Right to Informed Choices.[58] Notwithstanding the above, the world's largest producer of GM Crops, the United States, is conspicuous by its absence from the list. In so far as consumption of GM Food bears a direct toll on the consumer's right to enjoy a life with good health, South Africa has provided for amendments to the Regulations to its Consumer Protection Act to regulate GM labelling.[59] India, though with dedicated food legislations and specialised bodies to look into GMO Regulation, has still an extensive path before her to hedge consumers against foreign imports of GM Products and ensure that issue-centric legislations meet their purpose of protecting consumer interests, in comparison to a generic Consumer Protection Act 1986, which at present doesn't bear any provision relating to GM to deal with conflicts between commercial interests and public health/ consumer's health.

It is utterly shocking to note that former Prime Minister, Dr. Manmohan Singh said at the 100th Science Congress, "Complex issues, be they genetically modified food or nuclear energy or exploration of outer space, cannot be settled by faith, emotion and fear but by structured debate, analysis and enlightenment.

57 R. Bandopadhyay, Is BtBrinjal Ready for Future Food?—A Critical Study, 11 Indian Journal of Biotechnology 238, 240 (April 2012).

58 See, Labelling Around the World, available athttp://justlabelit.org/right-to-know/labeling-around-the-world/ (Last visited on June 14, 2014).

59 See African Centre for Bio-Safety, Regulationsto the Consumer Protection Act related to labelling of Genetically Modified Organisms: Regulation 9.1 for the purposes of Section 24(6), available at http://labelgmfoods.org.za/wp-content/uploads/2011/03/Comments-on-Regulations-to-the-Consumer-Protection-Act.pdf (Last visited on December 22, 2013).

A scientific approach and understanding of these issues are therefore as vital as our core scientific capabilities,"[60] while just a year later, his stance seemed strangely manipulated when he mentioned, "Use of biotechnology has great potential to improve yields. While safety must [also] be ensured, we should not succumb to unscientific prejudices against Bt. crops,"[61] inaugurating the 101st session of the Indian Science Congress.

Survey Analysis

A survey was conducted by the researcher[62] to conclude whether there is a relation between the causes behind preferring GM Food to other food products and its factors (or the true reasons behind the same). The results of the survey have been analysed using the Chi-Squared Analysis Method.[63] It is sought to be examined whether the reasons/claims mentioned for promulgation of GM Foods, are actually the real causes behind consumers(prospective or current) preferring GM Food, if at all.

The Null Hypothesis states, "There is no conclusive relation between the causes behind preferring GM Food to other food products and its factors/claims."

60 K.C. Ravi, Time to Shed our Prejudices Against GM, The Hindu (July 31, 2013), available at http://www.thehindubusinessline.com/opinion/time-to-shed-our-prejudices-against-gm/article4974591.ece (Last visited on June 15, 2014).

61 P. Sunderarajan, At Science Meet, PM Pitches for GM Crops, The Hindu (February 3, 2014), available athttp://www.thehindu.com/news/national/at-science-meet-pm-pitches-for-gm-crops/article5648525.ece (Last visited on June 15, 2014).

62 See, Annexure.

63 A widely-preferred statistical tool for analysing survey results. It takes the result envisaged as the Null Hypothesis, which is proved right if the calculated Chi Value is greater than the probability value, or the level of significance. For the given analysis, the level of significance is chosen as 0.05 and the Degrees of Freedom are=3-1=2(Number of options provided in the survey minus one).

The results[64] have been summarised in the given table-

Options	Observed Respondents	Expected Respondents
Option a	42	30
Option b	28	30
Option c	20	30
Chi Value[#]	0.082284	

Since the Chi Value is greater than the Level of Significance (=0.05), the Null Hypothesis shall be accepted. This provides conclusive proof to the fact that there is no correlation between the actual reasons for preferring GM Foods and the claimed causes (as suggested by the MNCs) behind the same.

The result of this survey clearly stands for the level of unawareness among consumers, thus espousing stronger, their case for the right to know. In what may be said to be a nebulous relationship, consumers manifestly don't bear knowledge about the foods they are eating and the causes behind the same. In such a scenario of palpable fuzziness and ambiguity, it is downrightly unjustified to allow GM foods in the market.

Conclusion

The article, through the content analysis and survey, has visibly brought out the dire need to not get swayed by fascinating ideas of gene swapping and creating designer organisms capable of being a panacea to the world's food woes, but rather to see through the wide gap between the claims and actual delivery of GM, as a technology. Section 1.1 shows how GM is not the same as natural breeding; 1.2 brings out the sombre effects of gene-twitching; 1.3 legally defends the consumer's right to good health and know about the food

The Chi-Square Value is calculated by squaring the result obtained by subtracting observed from expected and then dividing it by expected, finally to add up all such results."

64 Since the number of respondents is 90, and there are 3 options, under each option 30(=90/3) is the expected number of respondents.

they consume; 1.4 further evidences instances of GM application gone awry and 1.5 has raised questions on law and regulator-functioning in India, with 1.6 empirically attesting the need for consumer's right to know.

The correlation between findings and funding, as brought out in this article, shatters the image of 'helping and healing' a world gripped by an insolent food crisis using GM technology. Due regard to safety processes is needed before enforcing such food on consumers. The first step herein, is consumer awareness, for knowledge shall empower them to seek action from hitherto smug governments across the globe, and in turn protect their right to good health. Thomas Jefferson has rightly said, "If people let the government decide what foods they eat and what medicines they take, their bodies will soon be in as sorry a state as are the souls of those who live under tyranny".[65] Consumers have a right to know and this right must be upheld.

The researcher suggests that unless authentic studies do not validate safety of GM Food for consumption, they may not be let loose for commercial distribution in markets. Thus proponents of Genetic Modification process, when they call those who argue against it to be "full of sound and fury, signifying nothing"[66] are blatantly wrong. For those products regarded as innocuous and which ultimately do find a way onto our platter, labelling is the primary precautionary step to inform consumers and enable them to make guided choices. Mere existence of regulations/laws will not protect consumer's interests, until execution is lacklustre and the regulators are listless and dispirited to protect citizens' rights. In such a scenario, consumer awareness alone can galvanise them to demand tougher stands, which is why this paper champions the right to know. A measure of allowing GM Food that potentially perils the health of everybody in the nation must only be very cautiously taken, uninfluenced by vested interests or political sways.

65 Mahesh Bhatt, Supra n. 36.

66 K.C.Ravi, Supra n. 60.

Case Comments

In Re: Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News – an Epitome of Aggression Against Women

*Yashomati Ghosh**

Introduction

In recent times the incidents of crime against women(CAW) have steadily been on the rise and the nature of brutality committed against women has crossed all barriers of humanity. Unlike general forms of crime like murder, robbery, theft, cheating etc. the term 'crime against women' refers to the specific offences which are directed specifically against women like rape, dowry harassment, outraging the modesty, trafficking etc.[1] Modernization and technological advancements in society have not only perpetuated such offences but has given rise to new forms of violence like stalking, cyber bullying etc. According to the National Crime Records Bureau (NCRB) 2012 report a total of 2, 44,270 incidents of CAW were reported in the year 2012 which was an increase by 6.4% in comparison to the previous year.[2] West Bengal has registered the highest percentage of CAW in 2012 with more than 12.7% of the total crime committed in Indiabeing reported from the state as against 7.5% share of the country's total female population.[3] The offence of rape which was on the decline in 2008-2009 witnessed a steady increase in the period 2009-2012, with a record of 24,923 registered cases.[4] It was found that 12.5% of the victims were girls under the age of 14 years, 23.9% were teenagers, 50.2% belonged to the age group of 18-

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1 NCRB 2012 Report, Crime Against Women, Chapter 5 p. 79.

2 Ibid.

3 30,942 cases of crime against women were registered in West Bengal in 2012.

4 Section 376 IPC.

30 years, and 12.8% of the victims were in the age-group of 30-50 years while 0.05% was above the age of 50 years. The study of the NCRB clearly indicates the need to adopt aneffective strategy along with creation of a more responsive administration in dealing with the intolerant and aggressive attitude of some members of the society towards the women. The Supreme Court of India in the case of In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News[5] expressed not only their concern and anguish against the deplorable acts of violence against women but also extended the scope of state liability for failure to prevent such crimes and protect the fundamental rights of the women by widening the scope of compensation and rehabilitation for breach of Article 21 of the Constitution.This judgment assumes further significance for recognizing the rights of the victims in criminal proceedings and justiciates the imposition of penal sanctions and departmental proceedings against state officers in case of failure to protect the constitutional and legal rights of the citizens against social malpractices and crimes.

Background Facts of the Sou-Moto Writ Petition

On January 23, 2014 a news item was published in the Business and Financial News reporting the barbaric act of gang rape of a 20 year old woman in the Sabalpur Village of Birbhum district in West Bengal as a form of punishment imposed by the community panchayat (salishimeeting) for having relationship with a man outside her community. The Supreme Court based on the news report sou-moto action and directed the District Judge of Birbhum district to inspect the place of crime and inquire about the crime committed and report the same to the Court within a week. However in the absence of any specific information regarding the steps undertaken by the police against the perpetrators, the Court directed the Chief Secretary, West Bengal to submit a detailed report and sought the assistance of Mr. Sidhharth Luthra as an amicus in the matter. Based on the report submitted the Court identified a number of important issues relating to the CAW and passed few orders in the sou-moto petition which are of great relevance for maintenance of law and order and

5 MANU/SC/0242/2014

creating a safe living environment for women. The legal issues and the orders can be classified under the following heads (i) Investigation of CAW; (ii) Freedom of marriage; (iii) Prevention of recurrence of CAW; (iv) Vicarious liability of the State; and (v) Victim compensation and rehabilitation.

i. Investigation of CAW

The Criminal Law (Amendment) Act, 2013 amended the Indian Penal Code, 1860 (IPC), Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 (CrPC) to strengthen the legal regime against the growing incidence of sexual crimes committed against women. The amendment was an outcome of the public pressure post 2012 Delhi gang rape case (popularly known as the Nirbhaya case)[6]. The amendments to the criminal law were suggested by the judicial committee headed by former Chief Justice of India Shri. J.S.Verma.[7] The 2013 Amendment has recognized new forms of offences like acid attack and its attempt,[8] sexual harassment,[9] act with intent to disrobe a woman,[10] voyeurism[11] and stalking.[12] Changes have also been made in the IPC provisions relating to offences dealing with trafficking of persons for exploitations[13] and widening the definition of the term rape and increasing the quantum of punishment.[14] A new provision Section 376A has been further added to deal with offences of

6 On 16th December 2012 a female physiotherapy student was inhumanly tortured and gang raped in a private bus in Delhi. She died from the injuries after thirteen days. The incident generated massive public protest against the growing deterioration of law and order situation in the country and made a demand for stringent legal measures to deal with crime against women.

7 The Central Government had appointed a judicial committee headed by Justice J.S. Verma to make suggestions on necessary amendments to be made in the criminal law to deal with crime against women. The report of the Committee was based on several suggestions and recommendations made by the public in general as well as eminent jurists, legal professionals, civil society groups, women activists etc.

8 Sections 326A and 326B of IPC.

9 Section 354A, IPC.

10 Section 354B, IPC.

11 Section 354C, IPC.

12 Section 354D, IPC.

13 Sections 370 and 370A of IPC.

14 Section 375, IPC.

sexual assault which inflicts such injury so as to cause death or cause the person to be in a persistent vegetative state. Changes were also introduced in the CrPC and the Evidence Act to make investigation process victim friendly. Inspite of these changes in law the amicus curie highlighted a number of shortcomings in the investigation process in this case like errors in the FIR, failure to record statements by a woman police officer as provided under Section 154 of CrPC, delay in the recording of statements of the woman against whom the offence was committed, discrepancies between the FIR and the Report of the Judicial Officer as well as non-invocation of several relevant provisions of the IPC dealing with offences like criminal intimidation, grievous hurt, extortion, sexual harassment and disrobing a woman etc. This case categorically highlights that in spite of legislative amendments heinous acts of rape, including gang rape perpetuate in society due to lack of political will and inadequate training among the investigating agencies. The Supreme Court categorically observed that "Such crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner."It is the absolute responsibility of the state police machinery to prevent the occurrence of such crimes and the procedural rules laid down in the different laws should be strictly adhered by the investigating officers as measures to protect the rights of the victims.

ii. Freedom of Marriage

On the issue inter-caste marriages the Court reiterated its earlier observations in the case of *Lata Singh* v. *State of U.P.*[15] wherein it asserted that the practice of inter-caste marriage is in the national interest and will help in ameliorating the curse of caste system in the country in the long run. It had condemned all acts of violence or harassment by members of the community against couples performing inter-caster or inter-religious marriages as illegal and should be subjected to severe punishments. It is the fundamental right of every person on attaining the age of majority to freely marry a person of his or her choice. This right is guaranteed under Article 21 of the Constitution. It is the duty of the administration and the police authorities to protect the boy and the girl who perform inter-caste or inter-religious marriages and initiate criminal

15 MANU/SC/2960/2006; (2006) 5 SCC 475

proceedings and take stern actions against people who threaten or harass such couples. The Court had observed that the act of 'honour' killings is "nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way we can stamp out such acts of barbarism."If the parents of the bride or groom has any objection to the performance of their children's marriage they are free to cut-off all social ties with the children but they do not have right to 'give threats or commit or instigate acts of violence' against them. The Court further suggested that the recommendations of the Law Commission of India in its 242nd Report on Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition) should be strictly adhered and the proposed bill on the Prohibition of Interference with the Freedom of Matrimonial Alliances Bill 2011 should be enacted to curb the social malady.

iii. Prevention of recurrence of CAW

It is the responsibility of the administrative and police officials to take strong measures to prevent CAW. In case of such incidents actions should be taken not only against the persons responsible for the atrocities, but official actions should also be taken against the District Magistrate/ Collector and SSP/SPs of the district and all other officials concerned for their failure to maintain law and order, and prevent the occurrence of such crimes. The government officials should be immediately suspended, charge-sheeted and subjected to departmental proceedings if - (a) they fail to take prompt actions against the culprits, apprehend them and initiate criminal proceedings or (b) they fail to prevent the commission of such crimes in spite of receiving prior information. The different police and administrative officials will be deemed liable for the crimes committed and held accountable for the same. It is the duty of the police officers to visit villages and other rural areas on every alternate days to "instill a sense of security and confidence amongst the citizens of the society and to check the depredations of criminal elements."

iv. Vicarious liability of the State

The Supreme Court redefined the scope of vicarious liability of the state for

failing to protect the life, liberty and dignity of its citizens. The earlier principles on liability of the State for the tort committed by its citizens as held in cases like *State of Rajasthan* v. *Vidyawati*[16] and *Rudul Sah* v. *State of Bihar*[17] was widened by the Court in the other leading cases like *NagendraRao* v. *State of A. P.* and *Chairman Rly. Board* v. *Chandrima Das*[18] whereby it has been held that the doctrine of sovereign immunity has been greatly diluted and the State shall be immune from liability only in cases of acts of state like defence of the country, administration of justice, maintenance of law and order, except when Article 21 is breached. In the *Chandrima Das case* the Court observed "Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution."Following similar rationale the Supreme Court upheld the responsibility of the state in preventing the commission of heinous crimes like gang rape and observed that "The State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage." It was further observed that the offences are resultant of the States incapacity or inability to protect the Fundamental rights of its citizens and the state police machinery should be held responsible for such incidents.

v. Victim compensation

The Supreme Court and the High Courts have used their writ jurisdiction to award monetary compensation to the victims for acts of misfeasance and nonfeasance on the part of government officers in several cases. The Court has recognized the duty of the State to provide compensation as ex gratia payment to the victims in case of failure of the State to protect his or her fundamental right. In the earlier case of *Bodhisatwa* v. *Ms. Subhra Chakraborty*[19] the Supreme Court

16 AIR 1962 SC 933.

17 AIR 1983 SC 1086.

18 (2000) 2 SCC 465.

19 (1996) 1 SCC 490.

had held that 'rape' was an offence which was violative of the Fundamental Right of a person under Article 21 of the Constitution. In the Chandrima Das case the Supreme Court upheld the tortious liability of the State and awarded compensation for failure to provide security to a foreigner who was raped in the premises of Indian Railways. In the present case the Court recognized the necessity to grant monetary compensation but also observed that "The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will atleast provide some solace." It has further recognized that the victims of social and sexual violence need proper rehabilitation in society to live their lives with dignity. The Court upheld the need to apply Section 357A of the CrPCwhich has imposed the duty on the State Governments to formulate schemes for compensation to the victims of crime in coordination with the Central Government. It is the responsibility of the District Legal Service Authority and the State Legal Service Authority to determine the quantum of compensation to be paid in each case based on its facts and circumstances. In light of the heinous nature of the crime committed the Court recommended the need to pay interim compensation as an immediate remedial measure along with the adoption of other forms of substantial rehabilitation measures for the victim as a matter of paramount importance. Broadening the ambit of State liability by recommending the adoption of adequate rehabilitation measures the Court observed that "The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case."In accordance the Court approved of the following rehabilitation measures for the victim –

1. Payment of compensation of Rs. 5 lakhs by the West Bengal Government to the victim within a month.
2. Adequate legal aid services to the victim
3. Issuance of pattain respect of allotment of a plot of land to the victim under the Nijo Griha Nijo Bhumi Scheme of the State government.
4. Construction of residential house under the scheme Amar Thikanaas well as sanitary latrine and tube wells.
5. Payment of widow compensation to the victim.
6. Enrollment of the victim under the Social Security Scheme for Construction Worker.

7. Issuance of Antyadaya Anna Yojna card to the victim and her mother
8. Grant of relief and other government relief articles to the victim and her family.

It was also directed that the state authorities should undertake adequate measures to ensure the safety and security of the victim and her family as part of the long term rehabilitation strategy. It is the duty of the Circle Officer to inspect the victims place on a day-to-day basis so that she nor her family members are made to suffer from threats and fear of backlash in the hands of other members of the community.

Conclusion

The case assumes a landmark importance for recognizing and upholding the rights of the victim in dealing with sensitive cases of sexual offences. Traditionally criminal justice administration has been based on the adversarial model of punishing the guilty only when the guilt is proved beyond all reasonable doubts and focused on protecting the rights of the accused. Rights of the accused were deemed to be an integral part of the constitutional scheme of things under Articles 19, 20, 21 and 22 of the Constitution. The victims and the aggrieved parties were often pushed to the periphery during the investigation and judicial process. The conservative social structure forced the victims of sexual crimes to suffer from public ignominy and humiliation and face the apathy of the state authorities. The Court recognized that the procedural measures and safeguards provided in the CrPC and the Evidence Act are not only essential in ensuring fair trial but should be strictly adhered to as rights of the victims of crime. It is the duty of the courts and the police officials to be vigilant in upholding and implementing these procedural measures so as to protect the dignity and honour of the victims as well as to prevent recurrence of such crimes in future.

The Supreme Court further recognized the vulnerability which women suffer not only in the hands of few men in society but also by the different community institutions which in the name of moral policing instigate and commit extreme acts of criminal and sexual violence against young vulnerable girls. Acts of such

majoritariansm are in violation of the constitutionally guaranteed rights and freedoms in society and attempts to create a supra legal structure in society which is against the rule of law. The Court strongly criticized the commission of such crimes as well as the failure to prevent the occurrence of such crimes as a contravention of not only the domestic laws but are also in breach of the human rights obligation to protect and honour the dignity of a woman under the international law. It is the obligation of the state to protect women from all forms of discrimination and it is their right to demand stringent actions against both the perpetrators of such crimes as well as against the State authorities for their failure to perform their duty as guaranteed under the Constitution of India.

In summation the Supreme Court made the following suggestions which are relevant to curb the growing incidents of crime against woman–

1. All parts of the State machinery must work in harmony with each other to safe guard the rights of women in society.
2. Registration of FIR is mandatory under Section 154 IPC in case the information discloses commission of a cognizable offence and the Police are duty bound to register the same.
3. The procedural measures and safeguards as provided under the CrPC in dealing with cases of violence against women should be strictly adhered to and recognized as rights of the victims.
4. Police officers must visit villages and other rural areas on every alternate days toinstill a sense of security and confidence amongst the members of the rural community and to promote rule of law.
5. All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person are statutorily obligated to provide first aid or medical treatment, free of cost to victims of offences against women.
6. Government should formulate and implement policies to uplift the socio-economic condition of women, sensitization of the police and other concerned parties.

7. Adequate education and awareness camps should be undertaken in areas where there is high percentage of CAW.
8. The draft bill on the Prohibition of Interference with the Freedom of Matrimonial Alliances Bill 2011 should be brought before the Parliament for the immediate enactment.

Esha Ekta Apartments Co-operative Housing Society Ltd. and others v. *Municipal Corporation of Mumbai and others*, 2013 (5) SCC 357

Sanyukta Singh[*]

Supreme Court rules against regularization of unauthorised construction –

(The judgment was delivered by the Supreme Court on February 27, 2013. Thereafter, various attempts were made by the residents to seek relief, but the Supreme Court on June 3, 2014 refused to further stay the demolition and on June 23, 2014 the Municipal Authorities were able to enter the premises to commence demolition.)

Unauthorized construction in blatant violation of applicable municipal laws and sanctioned plans is widespread in our cities. While in certain cases unauthorized constructions have been regularized by State Governments, the Courts have ruled that in the larger interest of public health and safety, the same should be done as an exception and not as a rule[1]. However, belated enforcement of town planning/ zoning laws by the courts costs the affected individuals their right to property. In *Esha Ekta Apartments Co-operative Housing Society Ltd. and others* v. *Municipal Corporation of Mumbai and others*[2], the Supreme Court considered whether Campa Cola Residents Association was entitled to seek regularization of apartments constructed illegally by the builders. The Supreme

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1 In Friends Colony Development Committee v. State of Orissa, (2004) 8 SCC 733, the Supreme Court held that "…deliberate deviations do not deserve to be condoned and compounded … A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future".

In Royal Paradise Hotel (P) Ltd. v. State of Haryana and Ors,. (2006) 7 SCC 597, the Supreme Court held that marginal or insignificant accidental violations unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception.

2 2013 (5) SCC 357.

Court held that the applicable municipal laws[3] did not entitle the residents to seek a mandamus for regularization of unauthorized construction and hence, rejected their prayer for the same and upheld the notices issued by the municipal corporation for demolition of the same[4].

In this case, the builders had received approval from the municipal corporation on 2 February, 1983 for construction of 9 buildings of ground plus five upper floors. Thereafter, amendments were proposed by the builders to the sanctioned plan but they were rejected by the municipal authorities on 6 September, 1984. Inspite of rejection of the revised building plans, construction activities continued and work beyond the approved plans was carried out. In view of the same, stop work notice was issued on 12 November, 1984 by the municipal authorities under the Mumbai Municipal Corporation Act, 1888 informing that if the needful is not done, the construction will be forcibly removed. However, despite the said notice, construction work continued and was completed and subsequently the flats were occupied by the buyers; till 2005 when the municipal authorities issued notices giving details of the illegal structures proposed to be demolished. Thereafter, the housing societies filed a suit seeking to quash the said notices. The Trial Court dismissed the suit on the ground that the builders had constructed a number of floors without obtaining permission from the Planning Authority, that too, despite the stop work notice issued to them and that the application made for regularization of the illegal construction had been rejected by the Corporation. The Trial Court also rejected the contention of the members of the housing societies that they had purchased the flats without knowing that the same were illegally constructed by the developers/builders[5].

3 Maharashtra Regional and Town Planning Act, 1966 and Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

4 Ibid, at paras 45 and 46.

5 Based on the pleadings of the parties and the documents filed, it emerged that the architect through letters/ notices had told the builders and the housing societies that construction of the buildings was beyond the sanctioned plan and that no occupation permission was granted by the municipal corporation for most of the buildings and members of the housing societies were aware of these facts. Further, in the agreements executed by the builders with the buyers, it was clearly stated that the builders had submitted revised building plan, which was pending sanction and approval of the municipal corporation.

The appeal filed by the housing societies and their members was dismissed by the Bombay High Court, which agreed with the Trial Court that members of the housing societies knew that the flats occupied by them had been constructed in violation of the sanctioned plan. The housing societies and their members challenged the order of the High Court before the Supreme Court, but that was dismissed as well. However, since a separate writ petition seeking regularization of the disputed construction had been filed by the residents, which was pending before the High Court, the Supreme Court transferred the said writ petition to itself for consideration, prior to endorsing the demolition order.

Constitution of India grants power to the States to pass laws relating to land and hence, each State in the country typically has its version of a town and country planning statute (along with various rules and regulations made thereunder). The objective of such laws is to provide for planning and development of rural and urban land in such State and other purposes incidental thereto. Zoning and building regulations are generally notified as part of the planning statutes and municipal authorities are authorized thereunder to regulate and restrict building height, number of floors, percentage of a plot that may be occupied, size of open spaces, and other such matters. In Friends Colony[6], the Supreme Court stated that zoning and building regulations are legitimised from the point of view of control of community development, prevention of overcrowding of land, furnishing of recreational facilities like parks and playgrounds and availability of adequate water, sewerage and other utilities and governmental services. However, the period of economic growth that India saw post independence led to burgeoning of population and the resultant pressure on land led to unplanned growth (especially in urban areas). Illegal/unauthorised constructions and encroachments mushroomed as various municipal laws for planned development of the areas were violated with impunity and those entrusted with the task of ensuring implementation of the same failed to perform their duties[7]. The judiciary has time and again pronounced judgments that have, while taking cognizance of the hardship faced by owners of such

6 Supra n. 1.

7 Refer comments of the Supreme Court in Esha Ekta and Friends Colony.

properties, sought to come down harshly on deliberate and motivated violations of building laws and in several judgments the Supreme Court itself has upheld demolition of such buildings[8]. As stated above, while certain laws allow for regularization of unauthorized constructions on payment of penalty, the Courts have been explicit in their directions that such discretion should be exercised as an exception so that the practice of unauthorized construction is discouraged and public interest inherent in planned development is safeguarded[9]. In Esha Ekta, the Supreme Court prefaced its judgment by reproducing observations of the Supreme Court in *Friends Colony*[10], *Royal Paradise*[11], *Priyanka Estates*[12] and *Dipak Kumar Mukherjee*[13] where the Court had considered the same issue of regularization of unauthorized construction that was deliberate and in blatant violation of law by the builders. The Court also discussed the relevant provisions of the applicable municipal laws, that is, Maharashtra Regional and Town Planning Act, 1966 and Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. The Court observed that it was evident from an analysis of the provisions of the said Statutes and the rules made thereunder that the developer/ builder has to obtain sanctions and approvals from the concerned authority and disclose the same to the flat buyers, failure to do which could lead to penalty and prosecution.

8 Priyanka Estates International Pvt. Ltd. v. State of Assam, (2010) 2 SCC 27 and Dipak Kumar Mukherjee v. Kolkata Municipal Corporation, (2013) 5 SCC 386.

9 Supreme Court in para 38 of its judgment in Consumer Action Group and Others v. State of Tamil Nadu and Others, 2000 (7) SCC 425 has noted the possible consequences of regularisation. The Court noted that "the waiver of requirements of side set-back will deprive adjacent buildings and their occupants of light and air and also make it impossible for a fire engine to be used to fight a fire in a high rise building. The violation of floor space index will result in undue strain on the civil amenities such as water, electricity, sewage collection and disposal. The waiver of requirements regarding fire staircase and other fire prevention and fire fighting measures would seriously endanger the occupants resulting in the building becoming a veritable death trap. The waiver of car parking and abutting road width requirements would inevitably lead to congestion on public roads causing severe inconvenience to the public at large. Such grant of exemption and the regularisation is likely to spell ruin of any city as it affects the lives, health, safety and convenience of all its citizens".

10 Supra n. 1.

11 Ibid.

12 Supra n. 8.

13 Ibid.

The Court, however, noted that the said statutory provisions did not mandate regularization of construction made without obtaining the required permission or in violation thereof[14]. Further, based on the facts of the case, the Supreme Court also concluded that the flat buyers had consciously occupied the flats illegally constructed by the developers/builders[15]. In view of the same, the Supreme Court rejected the prayer for regularization of the construction made in violation of the sanctioned plan. However, the Court noted that the flat buyers could seek appropriate remedy against the builders by suing them for return of the money and/ or damages[16]. The Court also stated that the judiciary is expected to refrain from exercising equitable jurisdiction for regularization of illegal and unauthorized constructions else it would encourage violators of the planning laws and destroy the very idea and concept of planned development of urban as well as rural areas[17].

The decision of the Supreme Court in *Esha Ekta* is consistent with its pronouncements in earlier cases, as referred to in the paragraph above. It is also in line with the Court's stated objective to uphold the concept of planned development. However, the ultimate sufferers are those who spend significant sums of money to purchase such illegally constructed properties. The Supreme Court has made it clear that seeking regularization of unauthorised constructions is not the recourse available to such owners. While such owners can avail legal remedies against the builders, since the latter is perceived to be influential and unscrupulous, individuals are wary of initiating legal proceedings against them. In view of the same, the role of the municipal authorities gains importance and cannot be overemphasized. Timely action by the municipal authorities would ensure that there is no unauthorised construction and unsuspecting purchasers do not suffer. However, in the absence of effective monitoring by the municipal authorities, does the solution lie in regularizing unauthorised constructions?

14 Supra n. 2 at paras 39 and 44.

15 Ibid, at para 37.

16 Ibid.

17 Ibid, at para 45.

The Supreme Court observed in *Consumer Action Group*[18] that exemptions can only be granted to remove excessive and genuine hardship and not to allow violation of existing laws. However, suitable guidelines in this regard need to be framed by the Supreme Court. Further, the same would have to be backed by necessary amendments in State and municipal laws. In the absence of these measures, the power to grant exemptions/ condonation on a case to case basis becomes yet another avenue for arbitrary exercise of discretion, which will create more problems than it will solve.

18 Supra n. 9.

Book Review
'Isro Is Not Just Rockets'

*Kumar Abhijeet**

Book Details

Title: Touching Lives – The Little Known Triumphs of the Indian Space Programme

Author: S. K. Das
Publisher: New Delhi: Penguin Books India (2007).
ISBN: 9780143102168

When India launched its Mangalyaan or more formally Mars Orbiter Mission there was a mixed reaction from the people all over the Country. While it was a moment of rejoice for the scientific community and the Indian Space Research Organism (ISRO) but there was a popular criticism that the project was a needlessly expensive hunt for prestige when the country has failed to solve severe shortcomings in sanitation, education and child health. The Indian space programme has generally been slapped with such criticism that the money which India has been rocketing to space could have been utilized for addressing many other social issues. The critics have opined least priority for budgeting space project as they conceive outer space merely a fora for rocket activities involving enormous investment benefitting only the passionate scientist who have a quest for space. But had the critics gone through the book *'Touching Lives – The little known triumphs of the Indian Space Programme'* they would have realized that 'ISRO is not just rockets'. The book introduces to the other side of the Indian space programme and reveals it's little known triumphs. *Touching Lives* is a manifestation of competence of space based technology to address the social problems in India. The book is divided into thirteen chapters throws light on the contribution of ISRO in improving the life of an ordinary

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man breaking their mist of poverty and helplessness. Most of the ISRO projects are ongoing in the remote areas where facilities are not so freely available as compared to cities. It has taken real life examples from the various parts of the Country sharing experiences of people where ISRO has significantly made contribution in addressing their social problems.

The book begins with unveiling the historical journey of Indian space programme which was born in a church in the coastal village Thumba of Kerala. The journey which began with sounding rockets in November 1963 covering merely a height of 200 Km has traversed to developing polar satellite launch vehicle and geosynchronous satellite launch vehicle enabling manmade objects escaping the bonds of Earth. ISRO has been equally impressive in making indigenous satellites which has been used for tele-medicine, tele-education, communication etc. In disaster management they have been extremely useful where they have provided advance warning of impending disasters. ISROs remote sensing satellites have enabled surveys of natural resources so that the information they provide becomes the basis for planning and formulation of policy (page xiii). Even the judiciary has made use of such data to prevent forest encroachment (Id). S.K Das is of opinion that the satellite data has helped to better understand the human relation with natural resources and the impact of human intervention which has been key to evolving strategies for their sustainable development.

Chapter one describes about the contribution of ISRO in promoting social development. In 1975-76 around 2400 TV sets had been installed in isolated villages in six States of India, broadcasting programme through satellites to reach the villagers every evening. The programmes were in local language sharing information about agriculture, animal husbandry, dairy, poultry, health and hygiene, family planning, education. social issues like dowry, crime, superstition, alcholism etc. Alirajpur, is a small town in Jhabua district in Madhya Pradesh. Jhabua is perhaps the most backward district in the country and certainly the poorest having very low literacy rate, high dropout rate and high infant mortality. The majority populations (around 85%) are tribals. The Bhil community was once upon known for drinking, loot and fighting. But

after watching the ISRO programmes these tribal got a self-awakening.They willingly started sending their children to school, were concerned with health and hygiene issues, up small entrepreneurship. Generally the programmes telecasted on ISRO TV deals with a social issue which by way of entertainment (drama, songs, stories) carries a moral lesson provoking them to think about their life. The Machhlia village revealed a significant social change through ISRO satellite TV programmes. After watching these programmes all the villagers voluntarily an oath to give up drinking and they don't drink anymore. If anybody does he will be fined which will be credited to the village funds but so far never an occasion has arose to collect fine. Since they have given up drinking there is no more fight, no more loot. The programmes have been an eye opening for them which no law or policy would have achieved so effectively. "ISRO programmes have achieved the impossible"!

Yet another episode from Jhabua has been described in the Eighth chapter wherein ISRO has helped not only in developing watershed areas but also established watershed developing committee which is a committee of self-help groups in the village and of the user group having its own panchayat schemes like IRDP, Indira AwasYojana, Employment Assurance Scheme have not be so successful as compared to the panchayats of self-help group.

Koraput is an agricultural district in the State of Orissa and like Jhabua, an overwhelming percentage of Koraput's population are from scheduled caste and scheduled tribe. Koraput had often been in news for frequent draught causing starvation death. Imageries from ISRO satellites have been used to locate sites for drinking water reducing cost and time. In the past conventional, hydrological surveys were done to locate groundwater but due to human errors the result was not so accurate. The success rate through satellite data is 90 percent as compared to the 45 percent achieved using purely conventional methods. This chapter *(In Koraput – Finding Drinking Water)* describes how life of people has become easy after ISRO has helped them locate water sites. No more they have to go deep into forest or climb the mountains in search of water. Since such problem are common to most part of the country, in the year 1987 ISRO started preparing maps for all the then 447 districts in the country which was

to be used for National Drinking Water Technology Mission. In five years of time these maps formed the database for the entire country. Based on these maps, drinking water well was drilled all over the country. About 4.3 lakh habitations which were not covered at that time were later covered under the Rajiv Gandhi National Drinking Mission. That's incredible!– space technology shaping the public policy.

The State of Orissa also suffers from the problem of flood from the river Devi. The Chapter *'In Orissa – Helping Flood Efforts'* speaks for ISROs effort in disaster management.They provided important inputs on vital parameters of flood forecasting like catchment characteristics, soil moisture, hydraulics and hydrology. They have identified erosion prone area, river embankment vulnerable to breaching. They provide timely information about the area inundated by the floods which helps the user department in organizing relief camps. They also generate flood damage information by making use of satellite data acquired during flood, pre-flood, post-flood times along with ground information. On this basis an estimation of district wise flood inundated area, the crop area inundated, the number of villages marooned and the communicating network affected is done. Flood may go but the work of ISRO goes on.

The chapter *'The Himalyas in Garhwal – Pilgrim's Progress'* is the synergy between the remote sensing, communication and meteorological satellites capable in managing disasters. Landslides are common in the Himalayan terrain which also has popular pilgrimage sites for the Hindus. Every year hundreds of peoples are killed, properties are damaged and communication is blocked because of such lanslides. ISRO has helped in terms of preparedness, prediction, and rehabilitation from such landslides. Landslides maps help in preparing guidelines for land use and engineering structures, lays down the risk assessment framework. Space system also helps in predicting landslides by providing the slope and soil stability information and has played a crucial role in relief operations by providing details of affected areas, giving an estimate of relief road and communications, details of resilient structure for rehabilitation. Since rainfall is a major triggering factor in the Himalays ISRO has plotted a historical rainfall data to understand the rainfall behavior in a particular year

identifying hazard zones. With these maps landslide zones has been identified making the journey safe for the pilgrim's.

Chapter three narrates the ISROs efforts in educating children in Chamarajanagar district of Karnataka. The literacy rate was second lowest in the State. The district was infested by outlaws like Veerapan. The story is told of how a chief minister of Karnataka was out of office a couple of days after his visit to Chamrajnagar. Ever since, no other minister or person of note has visited this district. Against this backdrop ISRO jointly up its maiden programme of distance education for primary schools in Chamrajanagar with the Government of Karnataka. EDUSAT is the first thematic communication satellite of ISRO creating interactive classrooms network of about 50,000 primary school students. No other space-faring nation has an exclusive satellite dedicated to education. In order ensure no misuse of TV set place, the TV was so designed that it only telecasted EDUSAT based programmes supplementing curriculum-based teachings in schools. The transmission of the programmes was so synchronized that it corresponded with the school timetable for covering the syllabus. The Government of Karnataka prepared the programme contents capable of sustaining the interests of young audience over a period of time. The local teacher acted as facilitator helping the children understand what is being telecasted and clearing their doubts if any. "EDUSAT brought the best teachers virtually to remote and inaccessible places to teach students who were not privileged enough to be in big cities."

ISRO has contributed distinctively in realizing the seventy-third amendment to the Constitution of India and the corresponding legislations that were passed by the State Governments providing reservation of women in panchayat bodies. The Karnataka Panchayati Raj Act, 1993 enabled large number of women being elected to the panchayats but the problem was most of the women elected were first time/ first generation representatives which created doubt about their capacities of these women representatives to deliver in the political space which is so alien to them. It was not surprising that except a few most of them were not familiar with the legal provisions, the structure of the system, the rules and regulations that govern panchayat bodies, or with

even their own rights and responsibilities as members. In February 1995, over 600 women members of panchayats in Karnataka received training through satellite based interactive communication system. The training programme was a big hit with the participants. Later on in five phases from July 2002 to July 2003 other satellite-based interactive training programme for gram panchayat members was taken up in Karnataka. It covered 18,000 elected members of 1310 panchayats in forty-four taluks major target being the women representatives and those from the disadvantaged groups of the society. "The training programme contsisted of dramatized history of the Panchayati Raj idea, women's' account of how they became panchayat members and their experiences, plays describing the rules, procedures and structures of the panchayat and depiction of ways in which women representatives are cheated of their rightful place in the panchayat structure and group discussions on issues such as reservation, gender differences in approaches to functioning as panchayat members, obstacles created by families and local communities, and caste identity as a potentially devise factor." The chapter *'Karnataka Panchayat'* is a 'testimony to what the satellite-based interactive training programme can do in empowering the common man'.

In Lakshadweep ISRO has devised and put in place useful initiatives for fisherman to increase their catches. The island stands first in the country in per capita availability of fish. The entire indigenous population of island is scheduled tribes who are socially and economically backward. The satellite observation has helped in increasing the fish catch. They help in identifying the feeding ground of fish and make forecast for potential fishing zone (PFZ). 'PFZ mission is one of the best examples of translating the fruits of space technology to benefit the common man.'

Access to quality health services has been a major concern in remote areas. ISROs telemedicine programme has been a great boon to the poor people which provides connectivity between the patient's end and the specialist's end in faraway places. There is also facility for transmission of patient's medical images, records, outputs from medical devices in addition to providing two-way audio and video-conferencing. In one of the touching incident narrated in the

chapter *'In Tripura–Providing healthcare'* an eleven- month old baby was in great pain, would never sleep and always cry. The mother through ISRO telemedicine facility found that her child was having a heart problem. The medical record of the child was sent to Rabindranath Tagore International Institute of Cardiac Sciences, Kolkata. After a series of telemedicine appointment and usage of prescribed medicines the condition of child improved. Later a surgery was suggested. This treatment would not have been so easy available so easily in remote places like Tripura, but for ISRO. Many more similar incidences are covered in this chapter. "ISRO has its heart in the right place. It cares for the common man and his plight."

Sunderbans is known for its archipelago of islands having a dynamic ecosystem which was threatened by human deforestation. The island in the Sunderbans is subject to natural changing salinity, soil texture, tidal action and biotic pressure. The forest is known for mangrove trees which act as a natural nursery for a variety of commercially important prawns, crabs and finfish. They also provide nesting sites for a variety of birds and support many tropical & terrestrial organism. The chapter 'Sunderbans – Protecting the Ecosystem' reveals such a unique natural site is subject to awful things like loss of habitat, changes in species composition, loss in biodiversity. Activities like bunding, erosion and deposition have caused changes in tides and currents affecting the mangroves. The Royal Bengal Tiger survival is at threat due deforestation activities. The Regional Remote Sensing Service Centre, Kharagpur; an ISRO Unit has done an impressive work in the area of protecting the ecosystem of the Sundarbans. They have been mapping and monitoring the wetlands of Sundarbans delta by using satellite imagery. On the basis of the maps and the ground realities, ISRO has prepared a plan for the protection and conservation of the ecosystem of the Sunderbans. ISRO has taken the crucial first step in the right direction spreading environmental awareness among the people which has led in the improvement of the situation.

Chapter eleven *'In The Gangetic Plains – Reclaiming Sodic Land'* is the manifestation of impeccable work done by ISRO in Uttar Pradesh converting unproductive, barren soil into fertile, arable land. In 1986-88 remote sensing

data showed 1.37 million hectares of UP land under sodic soil which has poor moisture transmission property. Under the Uttar Pradesh Sodic Land Reclamation Project village wise reclamation plan was prepared which has made the soil cultivable by leaps and bound. In the words of one of the farmer these lands which were considered to be junk is now pots of gold.

Automatic Weather Station (AWS) records weather data such as temperature, atmospheric pressure, rainfall, wind speed and direction, relative humidity and solar radiation on continuous basis. It is a compact, modular, rugged low cost system which is capable of operating with minimum power battery and solar panel for extended periods in the field in remote areas. The AWS was conceived with the idea to benefit farmers living in the village by providing information which reduces the risk involved in agricultural operations and leads to improved productivity. The weather data also has potential application in public services such as heavy rainfall and flooding, and climate data for planning developmental activities. But we still need to develop reliable and accurate weather forecasts. "The trouble with weather forecasting is that it is too often to be ignored and wrong too often to rely it." Experiences of farmers living in different remote areas making use of AWS has been narrated in the Chapter *'In God's Own country –Automatic Weather Station'.*

The last chapter 'InThyagaraja's Land – The Village Resource Centre'reveals the efforts of ISRO in community empowerment and capacity building. Tiruvaiyaru is a small village in the State of Tamil Nadu where ISRO established its first Village Resource Centre as a tribute to Thyagaraja - the composer. The Village Resource Centre carries the benefits of space based systems to the ordinary villagers who often live in far-flung and interiors. It provides multiple services like tele-medicine, tele-health, tele-fisheries and other expert advice services for the benefit of the local and people, specific information in local language about the natural resources of the village for the overall development of the village. M.S. Swaminathan Research Institute who is the partner institute provide expert consultation to the villagers on issues of agriculture, and cropping including pest & disease management, seed & fertilizer availability, seed treatment, application of bio-fertilizers and bio-pesticides and organic farming, marketability of the

agricultural produce. The Village Resource Centre also provide training on water resources management, livestock management, basics of computer and utility to school children etc. The Centre did touch the life of common man as Thyagaraja did with his compositions.

The book has very well self-argued that outer space is not exclusively a fora for the scientific arena but is a community resource that has outreached to every individual. The book is a reckon ranging from the mountains of Himalayas to the God's own country – Kerala, embracing the glittering Ganges in the East to the incredibly beautiful Lakshadweep Islands, revealing how human life have become keen by just one touch of ISRO. "ISRO has capabilities that are comparable to the best anywhere in the world, but what makes it different is the way in which ISRO's satellites deliver services to the society, by shrinking both time and space." The data provided through satellites stationed in outer space has been much useful in developing public policies which enables one's personal life better on Earth. Critics must realize that it is not just rocketing money to outer space but is rather parachuting space based solutions to many of the social problems. At this juncture the words of Vikram Sarabhai – father of Indian Space programme becomes socially and scientifically relevant. "There are some who question the relevance of space activities in a developing nation. To us, there is no ambiguity of purpose. We do not have the fantasy of competing with the economically advanced nations in the exploration of the moon or the planets or manned space-flight. But we are convinced that if we are to play a meaningful role nationally, and in the comity of nations, we must be second to none in the application of advanced technologies to the real problems of man and society."

Call For Papers

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For National Law School of India University

Sd/-
Prof. [Dr.] R Venkata Rao